

1 to 2 red grouper in a reduced 4–fish grouper aggregate bag limit and prohibit the recreational harvest of red grouper and other SWG species from February 1 to March 31. Overall, these measures should allow the recreational harvest of red grouper to increase by 17 percent. To prevent the possibility of red grouper overfishing, proposed AMs would give the AA the authority to shorten the following recreational fishing season should the ACL be exceeded. The application of the red grouper AMs would be the same as those described above for the gag recreational fishery.

#### Proposed SWG Provisions of Amendment 30B

The SWG fishery includes eight species: gag, red grouper, black grouper, scamp (until the commercial SWG quota is reached, at which time scamp is considered a deep-water grouper), yellowfin grouper, rock hind, red hind, and yellowmouth grouper. Amendment 30B would set the commercial SWG quota as the sum of the gag and red grouper quotas with an allowance for other SWG species. Should the gag, red grouper, or SWG quotas be met, the entire SWG commercial fishery would be closed. It is likely the gag quota would be met prior to the red grouper or SWG quotas; therefore, Amendment 30B would establish an incidental harvest trip limit of 200 lb (91 kg) gutted weight for either gag or red grouper once either species reaches 80 percent of its quota. This would allow the SWG fishery to remain open until one of the three quotas was met. Proposed ACLs and AMs for the commercial SWG fishery would be similar to those developed for gag and red grouper, except the commercial SWG fishery would be closed once the gag, red grouper, or commercial SWG quota is met. Should the commercial SWG ACLs be exceeded despite the closure, the subsequent year's quota would be equal to the previous years.

For the recreational fishery, Amendment 30B would limit the overall recreational harvest of SWG species by instituting a reduced aggregate grouper bag limit from 5 to 4 fish and a season closure from February 1 through March 31 for all SWG species.

#### Proposed Season and Area Closure Provisions of Amendment 30B

Amendment 30B proposes a new restricted fishing area called “The Edges” that would remain in place until terminated through a subsequent amendment. This proposed restricted area is located between the existing Madison-Swanson and Steamboat Lumps marine reserves, spans 37

nautical miles along the 40–fathom contour, and covers 390 nautical square miles. It would be closed to all fishing under the Council's jurisdiction from January 1 through April 30 each year. Amendment 30B also proposes to extend indefinitely the Madison-Swanson and Steamboat Lumps marine reserves that are set to expire June 16, 2010. Should “The Edges” restricted fishing area be implemented, the current commercial February 15 to March 15 closed season for gag, black grouper and red grouper would be repealed.

#### Proposed Federal Compliance Provisions of Amendment 30B

To improve the effectiveness of the Federal regulations when there are less restrictive regulations in state waters, Amendment 30B proposes to require all vessels with Federal commercial or for-hire reef fish permits comply with the more restrictive of state or Federal reef fish regulations when fishing in state waters.

#### Proposed Rule for Amendment 30B

A proposed rule that would implement measures outlined in Amendment 30B has been received from the Council. In accordance with the Magnuson-Stevens Act, NMFS is evaluating Amendment 30B to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

#### Consideration of Public Comments

Comments received by December 29, 2008, whether specifically directed to the amendment or the proposed rule, will be considered by NMFS in its decision to approve, disapprove, or partially approve the amendment. Comments received after that date will not be considered by NMFS in this decision. All comments received by NMFS on the amendment or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: October 22, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No.0909251266–81274–01]

RIN 0648–XJ96

#### Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2009 Summer Flounder, Scup, and Black Sea Bass Specifications; 2009 Research Set-Aside Projects

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

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

**SUMMARY:** NMFS proposes specifications for the 2009 summer flounder, scup, and black sea bass fisheries and provides notice of three conditionally approved projects that will be requesting Exempted Fishing Permits (EFPs) as part of the Mid-Atlantic Fishery Management Council's (Council) Research Set-Aside (RSA) program. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) require NMFS to publish specifications for the upcoming fishing year for each of these species and to provide an opportunity for public comment. Furthermore, regulations under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) require a notice to be published to provide interested parties the opportunity to comment on applications for EFPs. The intent of this action is to establish harvest levels that assure that the target fishing mortality rates (F) or exploitation rates specified for these species in the FMP are not exceeded and to allow for rebuilding of the stocks as well as to provide notice of EFP requests, all in accordance with the Magnuson-Stevens Act.

**DATES:** Comments must be received on or before November 12, 2008.

**ADDRESSES:** You may submit comments, identified by RIN 0648–XJ96, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- Mail and hand delivery: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope:

“Comments on 2009 Summer Flounder, Scup, and Black Sea Bass Specifications.”

- Fax: (978) 281-9135.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the specifications document, including the Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and other supporting documents for the specifications are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901-6790. These documents are also accessible via the Internet at <http://www.nero.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Michael Ruccio, Fishery Policy Analyst, (978) 281-9104.

**SUPPLEMENTARY INFORMATION:**

**Background**

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Council and the Atlantic States Marine Fisheries Commission (Commission), in consultation with the New England and South Atlantic Fishery Management Councils. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35°13.3' N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, North Carolina) northward to the U.S./Canada border. Implementing regulations for these fisheries are found at 50 CFR part 648, subpart A (General Provisions), subpart G (summer flounder), subpart H (scup), and subpart I (black sea bass).

The summer flounder, scup, and black sea bass regulations outline the process for specifying the annual

commercial quotas and recreational harvest limits for the summer flounder, scup, and black sea bass fisheries, as well as other management measures (e.g., mesh requirements, minimum commercial fish sizes, gear restrictions, possession restrictions, and area restrictions) for these fisheries. The measures are intended to achieve the annual targets set forth for each species in the FMP, specified either as an F or an exploitation rate (the proportion of fish available at the beginning of the year that are removed by fishing during the year). Once the catch limits are established, they are divided into quotas based on formulas contained within the FMP.

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), signed into law by President Bush on January 12, 2007, added new requirements to involve the Council's Scientific and Statistical Committee (SSC) in the specification-setting process. Specifically, section 302(g)(1)(B) of the MSRA states that an SSC for each Regional Fishery Management Council "shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices." The Acceptable Biological Catch (ABC) is a level of a stock catch that accounts for the scientific uncertainty in estimate of that stock's defined overfishing level. This new requirement implemented by the MSRA was put into practice by the Council for the first time in the 2009 specification setting process. The SSC met on July 31, 2008.

The FMP's implementing regulations also require that a Monitoring Committee for each species review the best available scientific information and recommend catch limits and other management measures that will mitigate management uncertainty and/or implementation imprecision to ensure the target F or exploitation rate for each fishery is not exceeded. The Monitoring Committees met on August 1, 2008.

The Council and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board) consider the SSC and Monitoring Committees' recommendations and any public comment and make their own recommendations. While the Board action is final, the Council's

recommendations must be reviewed by NMFS to assure that they comply with FMP objectives and applicable law. The Council and Board made their recommendations at a joint meeting held August 5-7, 2008.

**Explanation of RSA**

*Background:* In 2001, regulations were implemented under Framework Adjustment 1 to the FMP to allow up to 3 percent of the Total Allowable Landings (TAL) for each species to be set aside each year for scientific research purposes. For the 2009 fishing year, a Request for Proposals was published to solicit research proposals based upon the research priorities that were identified by the Council (73 FR 7528, February 8, 2008).

NMFS has conditionally approved three research projects for the harvest of the portion of the quota that has been recommended by the Council to be set aside for research purposes. In anticipation of receiving applications for EFPs to conduct this research, the Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that the activities authorized under the EFPs issued in response to the approved RSA projects would be consistent with the goals and objectives of the FMP. However, further review and consultation may be necessary before a final determination is made to issue any EFP.

For informational purposes, these proposed specifications include a statement indicating the amount of quota that has been preliminarily set aside for research purposes (a percentage of the TAL for each fishery, not to exceed 3 percent, as recommended by the Council and Board), and a brief description of the RSA projects, including exemptions requested, and the amount of RSA requested for each project. The RSA amounts may be adjusted, following consultation with RSA applicants, in the final rule establishing the 2009 specifications for the summer flounder, scup, and black sea bass fisheries. If the total amount of RSA is not awarded, NMFS will publish a document in the **Federal Register** to restore the unused amount to the applicable TAL.

For 2008, the conditionally approved projects may collectively be awarded the following amounts of RSA: 553,500 lb (251 mt) of summer flounder; 220,200 lb (100 mt) of scup; and 69,000 lb (31 mt) of black sea bass. The projects may also be collectively awarded up to 1.3 million lb (590 mt) of *Loligo* squid;

844,680 (383 mt) of Atlantic bluefish; and 33,069 lb (15 mt) of butterfish.

**2009 RSA Proposal Summaries:**  
Project number 1 would conduct a fishery-independent scup survey that would utilize unvented fish traps fished on hard bottom areas in southern New England waters to characterize the size composition of the scup population. Survey activities would be conducted June 15–October 15, 2009, at 10 rocky bottom study sites located offshore, where there is a minimal scup pot fishery and no active trawl fishery, and at two scup spawning ground sites. Up to two vessels would conduct the research survey. Sampling would occur off the coasts of Rhode Island and southern Massachusetts. Up to four vessels would harvest the RSA during the period January 1–December 31, 2009. The principal investigators have requested exemptions from trip limits, gear requirements (excluding marine mammal avoidance and/or release devices), and closed seasons for harvest of RSA species. The preliminary RSA awarded for this project is 2,000 lb (0.9 mt) of summer flounder; 51,172 lb (23 mt) of scup; and 28,000 lb (13 mt) of black sea bass.

Project number 2 would conduct a near-shore trawl survey in Mid-Atlantic waters between Gay Head, Massachusetts, and Cape Hatteras, North Carolina, including both Block Island and Rhode Island Sounds. A stratified random sampling of approximately 200 stations will occur in depths between 18–60 feet (8–18 m). The function of the survey would be to provide stock assessment data for summer flounder, scup, black sea bass, *Loligo* squid, butterfish, Atlantic bluefish, several species managed by the Commission such as weakfish and Atlantic croaker, and unmanaged forage species. The research aspects of the trawl survey will be conducted by one scientific research vessel. This vessel will operate under a Letter of Authorization (LOA) as provided for by the specific exemption for scientific research activities found at 50 CFR 600.745. Up to 35 vessels will harvest the RSA January 1–December 31, 2009, during commercial fishing operations, except that these vessels have requested exemptions for closed seasons and trip limits to harvest the RSA allocated to the project. The preliminary RSA awarded to this project is 367,768 lb (167 mt) of summer flounder; 169,028 lb (77 mt) of scup; 41,000 lb (19 mt) of black sea bass; 97,750 lb (44 mt) of Atlantic bluefish; and 276,827 lb (126 mt) of *Loligo* squid.

Project number 3 would conduct an evaluation of discard mortality for

summer flounder in trawl fisheries. Combined sources of mortality and injury quantification that occur as part of trawling, tracking and tagging, and scuba diver observation will be utilized to provide an estimate of trawl-related mortality. Research sampling will be conducted adjacent to Little Egg Inlet off the New Jersey coast. Sampling would occur on the winter offshore fishing grounds south and east of Long Island, New York, between Veatch Canyon and Hudson Canyon during February–April 2009 and November–December 2009. Up to six vessels of opportunity will conduct the research activities and may simultaneously participate in harvesting RSA, if the season for summer flounder is closed or if more fish, above those needed for the research activities, are caught than are permitted by possession limits. The principal investigators have requested exemption from the commercial summer flounder minimum size so that fish smaller than 14 inches (35.5 cm) may be temporarily retained to assess viability and to affix tags and data transmitters. Up to 35 vessels will harvest the RSA January 1–December 31, 2009, during commercial fishing operations, except that these vessels have requested exemptions for closed seasons and trip limits to harvest the RSA allocated to the project. The preliminary RSA awarded to this project is 183,732 lb (83 mt) of summer flounder. Regulations under the Magnuson-Stevens Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

#### Explanation of Quota Adjustments Due to Quota Overages

This action proposes commercial quotas based on the proposed TALs and Total Allowable Catches (TACs) and the formulas for allocation contained in the FMP. In 2002, NMFS published final regulations to implement a regulatory amendment (67 FR 6877, February 14, 2002) that revised the way in which the commercial quotas for summer flounder, scup, and black sea bass are adjusted if landings in any fishing year exceed the quota allocated (thus resulting in a quota overage). If NMFS approves a different TAL or TAC at the final specifications stage (i.e., in the final rule), the commercial quotas will be recalculated based on the formulas in the FMP. Likewise, if new information indicates that overages have occurred and deductions are necessary, NMFS will publish notice of the adjusted quotas in the **Federal Register**. NMFS anticipates that the information necessary to determine whether overage

deductions are necessary will be available by the time the final specifications are published. The commercial quotas contained in these proposed specifications for summer flounder, scup, and black sea bass are not adjusted for any overages that have occurred. The final specifications will contain quotas that have been fully adjusted consistent with the procedures described above.

#### Summer Flounder

The timeline for completion of the summer flounder rebuilding program was extended from January 1, 2010, to no later than January 1, 2013, by section 120(a) of the MSRA. The Southern Demersal Working Group (SDWG), a technical stock assessment group composed of personnel from the Northeast Fisheries Science Center (NEFSC), NMFS Northeast Regional Office, Council, Commission, state marine fisheries agencies, academia, and independently-hired scientists, conducted a benchmark stock assessment of summer flounder in 2008. The recommendations of the SDWG were externally peer reviewed by scientists provided by the Center for Independent Experts' (CIE) through the NEFSC Stock Assessment Workshop (SAW)/Stock Assessment Review Committee (SARC) process. The 47th SARC, which peer reviewed the benchmark assessment conducted by the SDWG, upheld the recommendations of the SDWG described in the stock assessment, resulting in changes to the modeling approach used, adoption of revised F threshold and F management target values, and a change in assumed natural mortality. These changes resulted in modifications to the stock status determination criteria. Information regarding the results of the benchmark assessment, including summary information, reports provided by individual peer reviewers, and the detailed final assessment document can be found on the NEFSC SAW/SARC web page at: <http://www.nefsc.noaa.gov/nefsc/saw/>.

The 2008 SDWG benchmark assessment shows that summer flounder were not overfished and that overfishing did not occur in 2007, the year for which the most recent, complete fishery-dependent data are available. The fishing mortality rate in 2007 was estimated to be 0.288, below the benchmark assessment's overfishing threshold ( $F_{MSY}=F_{THRESHOLD}=F_{35\text{ percent}}^A$

<sup>A</sup> The fishing mortality rate which reduces the spawning stock biomass per recruit (SSB/R) to 35 percent of the amount present in the absence of

=0.310) but above the assessment-recommended management target ( $F_{TARGET}=F_{40\text{ percent}}=0.255$ ).  $F_{MSY}$  is the fishing mortality rate that, if applied constantly, would result in maximum sustainable yield (MSY) from the summer flounder stock. When  $F>F_{THRESHOLD}$ , overfishing is considered to be occurring. Fishing year 2007 is the first year of the rebuilding program in which overfishing did not occur on summer flounder. Spawning stock biomass (SSB) was estimated to be 95.6 million lbs (43,363 mt) in 2007, about 72 percent of the  $SSB_{35\text{ percent}}$  ( $SSB_{MSY}$  target proxy reference point) = 132.4 million lbs (60,056 mt). The benchmark assessment shows that the summer flounder stock has not been overfished since 2001. The average recruitment from 1982 to 2007 is 41.6 million fish. The 2007 year class is considered slightly below average at approximately 40.0 million fish.

The SSC, using the updated assessment information, recommended to the Council that the 2009 TAL be set no higher than 19.02 million lb (8,627 mt). Their recommendation was based on utilizing the benchmark assessment-recommended  $F_{TARGET}$  and related assessment information and methodology to derive an ABC that accounts for scientific uncertainty within the assessment. The Monitoring Committee considered the SSC's ABC recommendation, the assessment results, and management uncertainty. The Monitoring Committee recommended that the TAL could be set within a range of 19.02–17.87 million lb (8,627–8,105 mt) to account for imprecision associated with implementation of the management program.

The Council and Board considered the SSC and Monitoring Committee recommendations before adopting a 2009 TAL of 18.45 million lb (8,368 mt)

to recommend to NMFS. This TAL is the mid-point in the range recommended by the Monitoring Committee and is lower than the SSC's recommendation for ABC. This TAL has a 63-percent probability of not exceeding the F target in 2009 and a 97-percent probability of constraining fishing mortality below the overfishing threshold ( $F_{MSY} = F_{35\text{ percent}}$ ), and is thus expected to achieve the required stock rebuilding for summer flounder to exceed the  $B_{MSY}$  target by the January 1, 2013, deadline. This would be a 17-percent increase from the 2008 TAL of 15.77 million lb (7,153 mt). All other management measures were recommended to remain status quo.

The regulations state that the Council shall recommend, and NMFS shall implement, measures (including the TAL) necessary to achieve, with at least a 50-percent probability of success, a fishing mortality rate that produces the maximum yield per recruit ( $F_{MAX}$ ). However, Framework Adjustment 7 to the FMP (Framework 7) was implemented October 1, 2007 (72 FR 55704), to ensure that the best available scientific information could be adopted without delay by the Council for use in managing summer flounder. As such, the SDWG benchmark assessment recommended  $F_{MSY}=F_{35\text{ percent}}$  is now the best available fishing mortality rate that produces the optimum yield per recruit and is the threshold value for assessing whether overfishing is occurring on summer flounder, replacing  $F_{MAX}$ . A 2000 Federal Court Order (*Natural Resources Defense Council v. Daley*, Civil No. 1:99 CV 00221 (JLG)) also requires the annual summer flounder TAL to have at least a 50-percent probability of success. As previously stated, the Council and Board's recommended TAL of 18.45 million lb (8,368 mt) has a 97-percent probability of constraining fishing

mortality below the overfishing threshold of  $F_{MSY}=F_{35\text{ percent}}$  and a 63-percent probability of constraining fishing mortality below the assessment-recommended management target of  $F_{40\text{ percent}}$ . This TAL also has a 83-percent probability of constraining fishing mortality below the fishing mortality level ( $F_{REBUILD}=0.274$ ) that is expected to achieve the exact biomass target ( $B_{MSY}$ ) required under the rebuilding plan by January 1, 2013. In the past two years, TALs with a 75-percent probability of achieving  $F_{REBUILD}$  have been implemented for the summer flounder fishery. NMFS is proposing to implement a TAL of 18.45 million lb (8,368 mt) for 2009, consistent with the Council's and Board's recommendation.

The FMP specifies that the TAL is to be allocated 60 percent to the commercial sector and 40 percent to the recreational sector; therefore, the initial TAL would be allocated 11.07 million lb (5,021 mt) to the commercial sector and 7.38 million lb (3,348 mt) to the recreational sector. The Council and Board also agreed to set aside up to 3 percent (553,500 lb (251 mt)) of the summer flounder TAL for research activities. After deducting the RSA, the TAL would be divided into a commercial quota of 10,737,900 lb (4,871 mt) and a recreational harvest limit of 7,158,600 lb (3,247 mt).

Table 1 presents the proposed allocations by state with and without the commercial portion of the RSA deduction. These state quota allocations are preliminary and are subject to reductions if there are overages of states quotas carried over from a previous fishing year (using the landings information and procedures described earlier). Any commercial quota adjustments to account for overages will be included in the final rule implementing these specifications.

TABLE 1—2009 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS

| State | Percent Share | Commercial Quota |                 | Commercial Quota less RSA <sup>1</sup> |                 |
|-------|---------------|------------------|-----------------|--|-----------------|
|       |               | lb               | kg <sup>2</sup> | lb                                     | kg <sup>2</sup> |
| ME    | 0.04756       | 5,265            | 2,388           | 5,107                                  | 2,317           |
| NH    | 0.00046       | 51               | 23              | 49                                     | 22              |
| MA    | 6.82046       | 755,025          | 342,479         | 732,374                                | 332,205         |
| RI    | 15.68298      | 1,736,106        | 787,498         | 1,684,023                              | 763,873         |
| CT    | 2.25708       | 249,859          | 113,336         | 242,363                                | 109,936         |
| NY    | 7.64699       | 846,522          | 383,982         | 821,126                                | 372,463         |

fishing. More generally, FX percent is the fishing mortality rate that reduces the SSB/R to x percent

of the level that would exist in the absence of fishing.

TABLE 1—2009 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS—Continued

| State                    | Percent Share | Commercial Quota |                 | Commercial Quota less RSA <sup>1</sup> |                 |
|--------------------------|---------------|------------------|-----------------|--|-----------------|
|                          |               | lb               | kg <sup>2</sup> | lb                                     | kg <sup>2</sup> |
| NJ                       | 16.72499      | 1,851,456        | 839,821         | 1,795,913                              | 814,626         |
| DE                       | 0.01779       | 1,969            | 893             | 1,910                                  | 866             |
| MD                       | 2.03910       | 225,728          | 102,390         | 218,957                                | 99,319          |
| VA                       | 21.31676      | 2,359,765        | 1,070,390       | 2,288,972                              | 1,038,278       |
| NC                       | 27.44584      | 3,038,254        | 1,378,152       | 2,947,107                              | 1,336,808       |
| <b>Total<sup>3</sup></b> | 100.00001     | 11,070,001       | 5,021,353       | 10,737,901                             | 4,870,712       |

<sup>1</sup> Preliminary Research Set-Aside amount is 553,500 lb (251 mt).

<sup>2</sup> Kilograms are as converted from pounds and do not sum to the converted total due to rounding.

<sup>3</sup> Rounding of quotas results in totals exceeding 100 percent.

The Commission is expected to maintain the voluntary measures currently in place to reduce regulatory discards that occur as a result of landing limits established by the states. The Commission established a system whereby 15 percent of each state's quota would be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery has been closed. The intent of the incidental catch set-aside is to reduce discards by allowing fishermen to land summer flounder caught incidentally in other fisheries during the year, while also ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in these proposed specifications because these measures are not authorized by the FMP and NMFS does not have authority to implement them.

### Scup

The scup stock is considered overfished when the 3-year average of scup SSB is less than the biomass threshold (2.77 kg/tow; the maximum NEFSC spring survey 3-year average of SSB). In 2005, the NEFSC 3-year SSB index value decreased to 0.69 kg/tow, indicating that the stock was again below the minimum biomass threshold and considered overfished. Fishing year 2009 is the second year of the scup rebuilding program implemented in Amendment 14 to the FMP (72 FR 40077, July 23, 2007). The Amendment 14 rebuilding plan applies a constant F of 0.10 in each year of the 7-year rebuilding period.

The 2007 NEFSC Spring SSB 3-year average (2006–2008) index value of 1.16 kg/tow remains below the minimum biomass threshold of 2.77 kg/tow. While this is a 52-percent increase from the 2006 value of 0.76 kg/tow, the scup stock is considered overfished. The SSC, Monitoring Committee, Council, and

Board recommended a status quo initial TAL of 7.34 million lb (3,329 mt). Using the F=0.10 target exploitation rate specified in the Amendment 14 scup rebuilding plan would result in an initial TAL of 11.18 million lb (5,384 mt), a 52-percent increase from the 2008 TAL/status quo. The updated 3-year index value of 1.16 kg/tow is below the rebuilding plan projected value for 2006–2008 of 2.08 kg/tow, indicating rebuilding progress is currently behind the schedule established in Amendment 14. The SSC, Monitoring Committee, Council, and Board cited the need to ensure that rebuilding objectives are met in the early years of the program to avoid possible significant impacts in later years, as has occurred with a number of rebuilding efforts for other species that have fallen behind schedule. These groups also raised the issue of uncertainty surrounding the scup stock status, discard estimates, and survey inter-annual variation as a rationale for recommending status quo for 2009.

Scup discard estimates are deducted from both sectors' TACs to establish TALs for each sector, i.e., TAC minus discards equals TAL. The FMP specifies that the TAC associated with a given exploitation rate be allocated 78 percent to the commercial sector and 22 percent to the recreational sector. The commercial TAC, discards, and TAL (commercial quota) are then allocated on a percentage basis to three quota periods, as specified in the FMP: Winter I (January–April)--45.11 percent; Summer (May–October)--38.95 percent; and Winter II (November–December)--15.94 percent.

The discard estimates used in the 2009 TAC calculations were based on the average discards of 2006 and 2007 for the commercial and recreational fisheries. This discard estimate is 4.36

million lb (1,978 mt), resulting in a TAC of 11.70 million lb (5,339 mt). NMFS is proposing to implement the Council and Board recommendation for an initial TAL of 7.34 million lb (3,329 mt) and an 11.70 million-lb (5,339 mt) TAC.

The commercial TAC would be 9,126,000 lb (4,140 mt) and the recreational TAC would be 2,574,000 lb (1,168 mt). After deducting estimated discards (3.58 million lb (1,624 mt) for the commercial sector and 0.78 million lb (353 mt) for the recreational sector), the initial commercial quota would be 5.546 million lb (2,516 mt) and the recreational harvest limit would be 1.79 million lb (813 mt). The Council and Board agreed to set aside the maximum 3 percent (220,200 lb (100 mt)) of the TAL for research activities. Deducting this RSA would result in a commercial quota of 5,378,648 lb (2,006 mt) and a recreational harvest limit of 1,741,152 million lb (649 mt).

The TAC and TAL (commercial quota and recreational harvest limit) calculation methodology is the same as utilized in 2008 and previous years. However, it should be noted that because the discard estimates used for 2009 are different than those utilized in 2008, the final commercial quota and recreational harvest limits are not status quo; only the initial TAL of 7.354 million lb (3,329 mt) is the same as 2008.

The proposed 2009 specifications would maintain the status quo base scup possession limits, i.e., 30,000 lb (13,608 kg) for Winter I, to be reduced to 1,000 lb (454 kg) when 80 percent of the quota is projected to be reached, and 2,000 lb (907 kg) for Winter II.

Table 2 presents the 2009 commercial allocation recommended by the Council, with and without the preliminary RSA deduction. These 2009 allocations are preliminary and may be subject to downward adjustment in the final rule

implementing these specifications due to 2008 or other previously unaccounted for overages, based on the procedures for calculating overages described earlier.

TABLE 2—2009 PROPOSED INITIAL TAC, INITIAL COMMERCIAL SCUP QUOTA, AND POSSESSION LIMITS

| Period                   | Percent | TAC in lb (mt)    | Discards in lb (mt) | Commercial Quota in lb (mt) | Commercial Quota less RSA in lb (mt) | Possession Limits in lb (kg) |
|--------------------------|---------|-------------------|---------------------|-----------------------------|--------------------------------------|------------------------------|
| Winter I                 | 45.11   | 4,116,739 (1,867) | 1,614,938 (732)     | 2,501,801 (1,134)           | 2,426,308 (1,100)                    | 30,000 <sup>1</sup> (13,608) |
| Summer                   | 38.95   | 3,554,577 (1,612) | 1,394,410 (632)     | 2,160,167 (980)             | 2,094,983 (950)                      | n/a                          |
| Winter II                | 15.94   | 1,454,684 (660)   | 570,652 (259)       | 884,032 (401)               | 857,356 (389)                        | 2,000 (907)                  |
| <b>Total<sup>2</sup></b> | 100.00  | 9,126,000 (3,139) | 3,580,000 (1,623)   | 5,546,000 (2,516)           | 5,378,648 (2,440)                    |                              |

<sup>1</sup>The Winter I landing limit would drop to 1,000 lb (454 kg) upon attainment of 80 percent of the seasonal allocation.

<sup>2</sup>Totals subject to rounding error.

n/a-Not applicable

The final rule to implement Framework 3 to the FMP (68 FR 62250, November 3, 2003) implemented a process, for years in which the full Winter I commercial scup quota is not

harvested, to allow unused quota from the Winter I period to be rolled over to the quota for the Winter II period. As shown in Table 3, the proposed specifications would maintain the status

quo Winter II possession limit-to-rollover amount ratios (i.e., 1,500 lb (0.68 mt) per 500,000 lb (227 mt) of unused Winter I period quota).

TABLE 3—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD

| Initial Winter II Possession Limit |     | Rollover from Winter I to Winter II |           | Increase in Initial Winter II Possession Limit |       | Final Winter II Possession Limit after Rollover from Winter I to Winter II |       |
|------------------------------------|-----|-------------------------------------|-----------|--|-------|--|-------|
| lb                                 | kg  | lb                                  | mt        | lb   | kg    | lb   | kg    |
| 2,000                              | 907 | 0-499,999                           | 0-227     | 0  | 0     | 2,000  | 907   |
| 2,000                              | 907 | 500,000-999,999                     | 227-454   | 1,500  | 680   | 3,500  | 1,588 |
| 2,000                              | 907 | 1,000,000-1,499,999                 | 454-680   | 3,000  | 1,361 | 5,000  | 2,268 |
| 2,000                              | 907 | 1,500,000-1,999,999                 | 680-907   | 4,500  | 2,041 | 6,500  | 2,948 |
| 2,000                              | 907 | 2,000,000-2,500,000                 | 907-1,134 | 6,000  | 2,722 | 8,000  | 3,629 |

### Black Sea Bass

Amendment 12 to the FMP indicated that the black sea bass stock, which was determined by SARC 27 to be overfished in 1998, could be rebuilt to the target biomass within a 10-year period, i.e., by 2010. The current target exploitation rate is based on the current estimate of  $F_{MAX}=F_{MSY}=F_{REBUILD}$ , or 0.33 (25.6 percent). The northern stock of black sea bass was last assessed at the 43rd SAW in June 2006. The SARC 43 Panel did not consider the stock assessment to provide an adequate basis to evaluate stock status against the biological reference points, but did not recommend any other reference points to replace them.

The most recent NEFSC spring survey results indicate that the exploitable

biomass of black sea bass decreased in 2007. The 2007 biomass index, i.e., the 3-year average exploitable biomass for 2005 through 2007, is estimated to be 0.29 kg/tow, below the threshold biomass value of 0.976 kg/tow. Based on these results, if the biological reference points in the FMP are applied, black sea bass once again would be considered to be overfished.

The SSC, Monitoring Committee, Council, and Board recommended a 2009 TAL of 2.30 million lb (1,043 mt) for 2009, as calculated using the methodology in the rebuilding plan. This would be a 45-percent decrease from the 2008 TAL of 4.22 million lb (1,914 mt).

NMFS proposes to implement a 2009 black sea bass TAL of 2.3 million lb

(1,043 mt), consistent with the Council and Board recommendations. The FMP specifies that the TAL associated with a given exploitation rate be allocated 49 percent to the commercial sector and 51 percent to the recreational sector; therefore, the initial TAL would be allocated 1.127 million lb (511 mt) to the commercial sector and 1.173 million lb (532 mt) to the recreational sector. The Council and Board also agreed to set aside up to 3 percent (69,000 lb (31 mt)) of the black sea bass TAL for research activities. After deducting the RSA, the TAL would be divided into a commercial quota of 1,093,190 lb (456 mt) and a recreational harvest limit of 1,137,810 lb (516 mt), as specified in the FMP.

## Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

These proposed specifications are exempt from review under Executive Order 12866.

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact these proposed specifications, 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 to this proposed rule. A copy of this analysis is available from NMFS (see **ADDRESSES**). A summary of the analysis follows.

The total gross revenue for the individual vessels that would be directly regulated by this action is less than \$4.0 million for commercial fishing and \$6.5 million for recreational fishing activities. All vessels that would be impacted by this proposed rulemaking are therefore considered to be small entities and, thus, there would be no disproportionate impacts between large and small entities as a result of the proposed rule. The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. The Council estimates that the proposed 2009 specifications could affect 2,263 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2007 (the most recent year of complete permit data). However, the more immediate impact of this rule will likely be felt by the 891 vessels that actively participated in these fisheries (i.e., landed these species) in 2007.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action. In addition, NMFS is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with this proposed rule.

If the Council took no action regarding the 2009 specifications the following would occur: (1) No specifications for the 2009 summer flounder, scup, and black sea bass fisheries; (2) the indefinite management

measures (minimum mesh sizes, minimum sizes, possession limits, permit and reporting requirements, etc.) would remain unchanged; (3) there would be no quota set-aside allocated to research in 2009; and (4) there would be no specific cap on the allowable annual landings in these fisheries (i.e., there would be no quotas). Implementation of the no action alternative would be inconsistent with the goals and objectives of the FMP, its implementing regulations, and the Magnuson-Stevens Act. Under the no action alternative, the fisheries would operate without an identified cap on allowable landings because the quotas implemented for 2008 expire on December 31, 2008, and there are no provisions to roll-over those quota provisions into 2009 if specifications are not published for the year. Therefore, the no action alternative is not considered to be a reasonable alternative to the preferred action. The Council analyzed three TAL alternatives for 2009. Of these, one alternative, labeled Alternative 2, contained the most restrictive TAL options (i.e., lowest catch levels). While this alternative would achieve the objectives of the proposed action for all three species, it has the highest potential economic impact on small entities in the form of potential foregone fishing opportunities. Alternative 2 was not preferred by the Council because other alternatives considered have lower impacts on small entities while achieving the stated objectives of this proposed rule.

The Council analyzed two TAL alternatives that would accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize significant economic impact of the proposed rule on small entities. Alternative 1 (Council's preferred) would implement the following TALs in 2009: Summer flounder, 18.45 million lb (8,369 mt); scup, 7.34 million lb (3,329 mt); and black sea bass, 2.30 million lb (1,043 mt). Alternative 3 (least restrictive/highest quota levels) would implement the following TALs in 2009: Summer flounder, 19.02 million lb (8,627 mt); scup, 11.18 million lb (5,071 mt); and black sea bass, 4.22 million lb (1,914 mt).

Council staff conducted preliminary analysis on the potential economic impact of changes in recreational harvest limits associated with the alternatives. For the purposes of the RFA, the only entities affected by the proposed changes to the recreational harvest limit are owners and operators of recreational party/charter (for hire) vessels. These analyses indicate that it

is possible that adverse economic impacts could occur under Alternative 1 but would not be likely under Alternative 3. The methods utilized in the analysis compare 2007 recreational landings to the respective alternative's recreational harvest limit and make inferences on possible negative impacts to the demand for party/charter vessel trips and angler participation. While useful for a general statement on potential impacts, demand for party/charter trips has remained relatively stable for many years regardless of increases or decreases in the recreational harvest limit and ascertaining angler satisfaction relative to a total recreational harvest limit is subjective. More thorough analysis of recreational fisheries impacts will be conducted following the Council's recommendations for recreational management measures in December 2008. Once actual 2009 recreational management measures recommendations are known, more detailed analysis, including an IRFA, will be prepared by the Council.

To assess the impact of the alternatives on commercial fisheries, the Council conducted both threshold analysis and analysis of potential changes in ex-vessel gross revenue that would result from Alternatives 1 and 3. Some degree of caution should be utilized when interpreting the economic impact data as a host of variations could influence the outcomes of the analyses. Vessels have permits for multiple fisheries and may supplement income by landing other species; economic dependence on a particular species may be masked by vessels landing multiple species; ex-vessel value of the three species may change from the estimated values utilized in the analysis; revenues may increase or decrease as a result of changes to possession limits or seasons set by individual states; and reduction in commercial quota to account for previous years' overages may still occur in the specifications final rule.

Under Alternative 1 (Council's preferred), analysis indicates that 224 vessels out of the 891 (25 percent) that participated in 2007 summer flounder, scup, and black sea bass fisheries would be expected to incur revenue reductions of 5 percent or more. The reductions are attributable to the reduction in black sea bass TAL and affect vessels that landed solely black sea bass or black sea bass in combination with the other two species. The Alternative 1 IRFA analysis indicated that 647 of the 891 vessels (75 percent) that landed summer flounder and scup or some combination of both in 2007 would be expected to experience revenue increases in 2009 as

a result of the 16-percent increase in summer flounder and the 15-percent increase in scup allowable commercial landings in 2009.

Utilizing ex-vessel information from 2007, the Council estimated that Alternative 1 would increase cumulative summer flounder and scup vessel revenues by \$3.32 and \$0.57 million, respectively. Black sea bass vessel revenues are projected to decrease by \$2.85 million compared to 2008. If these increases and decreases are distributed equally among the vessels that landed summer flounder, scup, and black sea bass in 2007, the resulting increase in revenue per vessel would be \$4,770 for summer flounder and \$1,360 for scup. Individual vessel revenue would decrease by \$5,053 for vessels landing black sea bass.

Under Alternative 3 (least restrictive TALs), analysis indicates that 121 vessels out of the 891 (14 percent) that participated in 2007 summer flounder, scup, and black sea bass fisheries would be expected to incur revenue reductions of 5 percent or more. The reductions are again attributable to the reduction in black sea bass TAL. The Alternative 3 threshold analysis indicated that 770 of the 891 vessels (86 percent) of vessels would be expected to experience revenue increases in 2009 as a result of the 19-percent increase in summer flounder and the 77-percent increase in scup allowable commercial landings under the alternative.

The Council estimated that Alternative 3 would increase cumulative summer flounder and scup vessel revenues by \$4.08 and \$2.98 million, respectively. Black sea bass vessel revenues are projected to decrease by \$0.06 million compared to 2008. If these increases and decreases are distributed equally among the vessels that landed summer flounder, scup, and black sea bass in 2007, the resulting increase in revenue per vessel would be \$5,268 for summer flounder and \$7,112 for scup. Individual vessel revenue would decrease by \$153 for vessels landing black sea bass.

The Council selected Alternative 1 (preferred) over Alternative 3 (least restrictive) because, for summer flounder, Alternative 1 provides a higher probability of achieving the  $F_{TARGET}$  in 2009 (63 percent) and a higher likelihood of achieving the rebuilding target by January 1, 2013, than does Alternative 3, which provides a 50-percent probability of achieving the  $F_{TARGET}$ . For scup, Alternative 1 was preferred by the Council because it employs a more conservative TAL for 2009 as the rebuilding plan is slightly behind schedule in the first year of the 7-year rebuilding plan. The Council's previous experience with other species' rebuilding plans indicates that failing to set harvest levels below the maximum amount possible (i.e., the TAL in Alternative 3) in early years of

rebuilding plans when progress is slow or behind schedule has resulted in the need for more restrictive measures in late years of rebuilding efforts. The Council recommended the Alternative 1 TAL for black sea bass to be consistent with the  $F_{REBUILD}$  value prescribed by the rebuilding plan. The black sea bass TAL in Alternative 3 is status quo from 2008 and would be inconsistent with the goals and objectives of the black sea bass rebuilding plans as it would produce an  $F$  rate higher than  $F_{REBUILD}$ . As such, the IRFA provided by the Council indicates that the TALs of Alternative 1 satisfy the objectives of the applicable statutes and rebuilding programs and minimize the adverse impacts of the proposed rule on directly regulated small entities. NMFS agrees with the Council's IRFA analysis and rationale for recommending TAL Alternative 1. As such, NMFS is proposing to implement the TALs contained in Alternative 1 (Summer flounder, 18.45 million lb (8,369 mt); scup, 7.34 million lb (3,329 mt); and black sea bass, 2.30 million lb (1,043 mt)) for 2009.

Dated: October 22, 2008

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