

| End-use              | Substitute                                | Decision         | Further information   |
|----------------------|---|------------------|---|
| Total flooding ..... | ATK OS-10 as a substitute for halon 1301. | Acceptable ..... | <p>EPA has no intention of duplicating or displacing OSHA coverage related to the use of personal protection equipment (e.g., respiratory protection), fire protection, hazard communication, worker training or any other occupational safety and health standard with respect to halon substitutes.</p> <p>EPA recommends that users consult Section VIII of the Occupational Safety &amp; Health Administration (OSHA) Technical Manual for information on selecting the appropriate types of Personal Protective Equipment (PPE).</p> <p>EPA recommends that use of this system should be in accordance with the safe exposure guidelines for inert gas systems in the latest edition of NFPA 2001, specifically the requirements for residual oxygen levels, and should be in accordance with the relevant operational requirements in NFPA Standard 2010 for Aerosol Extinguishing Systems.</p> <p>Use should conform with relevant OSHA requirements, including 29 CFR part 1910, subpart L, sections 1910.160 and 1910.162.</p> <p>EPA has no intention of duplicating or displacing OSHA coverage related to the use of personal protection equipment (e.g., respiratory protection), fire protection, hazard communication, worker training or any other occupational safety and health standard with respect to halon substitutes.</p> |

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**DEPARTMENT OF COMMERCE**

**50 CFR Part 648**

[Docket No. 0809251266-81485-02]

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; Preliminary 2009 Quota Adjustments; 2009 Summer Flounder Quota for Delaware**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues final specifications for the 2009 summer flounder, scup, and black sea bass fisheries. This final rule specifies allowed harvest limits for both commercial and recreational fisheries, including commercial scup possession limits. This action prohibits federally permitted commercial vessels from landing summer flounder in Delaware in 2009 due to continued quota repayment from previous years' overages.

The actions of this final rule are necessary to comply with regulations implementing the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP), as well as to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The intent of this action is to establish harvest levels and other management measures to ensure that target fishing mortality rates (F) or exploitation rates, as specified for these species in the FMP, are not exceeded. In addition, this action implements measures that ensure continued rebuilding of these three stocks that are currently under rebuilding plans.

**DATES:** Effective January 1, 2009, through December 31, 2009.

**ADDRESSES:** Copies of the specifications document, including the Environmental Assessment (EA), Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and other supporting documents used by the Summer Flounder, Scup, and Black Sea Bass Monitoring Committees and Scientific and Statistical Committee are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901-6790. The specifications document is also accessible via the Internet at <http://www.nero.noaa.gov>.

The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses contained in this final rule, and the summary of impacts and alternatives contained in this final rule. Copies of the small entity compliance guide are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930-2298.

**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 under the provisions of the FMP developed by the Mid-Atlantic Fishery Management Council (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 (NC) 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, NC) northward to the U.S./Canada border. The Council prepared the FMP under the authority of the Magnuson-Stevenson Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the FMP appear at 50 CFR part 648, subparts A (general provisions), G (summer flounder), H (scup), and I (black sea bass). General regulations governing U.S. fisheries also appear at 50 CFR part 600. States manage summer flounder within 3 nautical miles of their coasts, under the Commission's plan for summer flounder, scup, and black sea bass. The Federal regulations govern vessels fishing in the exclusive economic zone (EEZ), as well as vessels possessing a Federal fisheries permit, regardless of where they fish.

The regulations outline the process for specifying the annual catch limits for the summer flounder, scup, and black sea bass commercial and recreational fisheries, as well as other management measures (*e.g.*, mesh requirements, minimum 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 (*i.e.*, the proportion of fish available at the beginning of the year that may be removed by fishing during the year). Once the catch limits are established, they are divided into quotas based on formulas contained in the FMP. Detailed background information regarding the status of the summer flounder, scup, and black sea bass stocks and the development of the 2009 specifications for these fisheries

was provided in the proposed specifications (73 FR 63934; October 28, 2008). That information is not repeated here.

NMFS will establish the 2009 recreational management measures for summer flounder, scup, and black sea bass by publishing proposed and final rules in the **Federal Register** at a later date, following receipt of the Council's recommendations as specified in the FMP.

#### Summer Flounder

This final rule implements the specifications contained in the October 28, 2008, proposed rule—a summer flounder Total Allowable Landings (TAL) of 18.45 million lb (8,368 mt) for 2009. This TAL has a 63-percent probability of constraining fishing mortality below the management target of  $F_{40\text{ percent}}=0.255$  and a 97-percent probability of constraining fishing mortality below the overfishing threshold of  $F_{\text{MSY}}=F_{35\text{ percent}}=0.310$ . In recent years, NMFS has implemented summer flounder TALs that contained a 75-percent probability of constraining fishing mortality below the level (*i.e.*,  $F_{\text{REBUILD}}$ ) expected to achieve the biomass target (*i.e.*,  $B_{\text{MSY}}$ ) by January 1, 2013, to ensure that the Magnuson-Stevens Act rebuilding program is satisfied. The 2009 TAL has an 83-percent probability of constraining fishing mortality below  $F_{\text{REBUILD}}=0.274$  level. Furthermore, for 2009, the TAL had been established using a management target that is lower than  $F_{\text{REBUILD}}$  (*i.e.*,  $F_{40\text{ percent}}$  (management target)  $< F_{\text{REBUILD}} < F_{\text{MSY}}$  (overfishing threshold)), thereby providing a greater

probability that the 2009 fishing mortality objective will not be exceeded and the required stock rebuilding will occur. This TAL setting approach also satisfies a 2000 Federal Court Order (*Natural Resources Defense Council v. Daley*, Civil No. 1:99 CV 00221 (JLG)) which requires the annual summer flounder TAL to have at least a 50-percent probability of success.

Three research projects that would utilize the full summer flounder research set-aside (RSA) of 553,500 lb (251 mt) have been conditionally selected by NMFS and are currently awaiting notice of award. If a proposed project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the summer flounder TAL through publication in the **Federal Register**. After deducting the 2009 RSA, the TAL is 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).

Consistent with the revised quota setting procedures for the FMP (67 FR 6877, February 14, 2002), summer flounder overages are determined based upon landings for the period January–October 2008, plus any previously unaccounted for overages from January–December 2007. Table 1 summarizes, for each state, the commercial summer flounder percent shares as outlined in § 600.100(d)(1)(I), the resultant 2009 commercial quota (both initial and less the RSA), the quota overages as described above, and the final adjusted 2009 commercial quota less the RSA.

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TABLE 1. FINAL STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2009

| State              | Percent Share | Initial Quota |           | Initial Quota, less RSA |           | 2008 Quota Overages (through 10/31/08) <sup>1</sup> |        | Adjusted Quota, less RSA |           |
|--------------------|---------------|---------------|-----------|-------------------------|-----------|---|--------|--------------------------|-----------|
|                    |               | lb            | kg        | lb                      | kg        | lb  | kg     | lb                       | kg        |
| ME                 | 0.04756       | 5,265         | 2,388     | 5,107                   | 2,317     | 0   | 0      | 5,107                    | 2,317     |
| NH                 | 0.00046       | 51            | 23        | 49                      | 22        | 0   | 0      | 49                       | 22        |
| MA                 | 6.82046       | 755,025       | 342,479   | 732,374                 | 322,205   | 29,760  | 13,499 | 702,614                  | 318,700   |
| RI                 | 15.68298      | 1,736,106     | 787,498   | 1,684,023               | 763,873   | 0   | 0      | 1,684,023                | 763,873   |
| CT                 | 2.25708       | 249,859       | 113,336   | 242,363                 | 109,936   | 0   | 0      | 242,363                  | 109,936   |
| NY                 | 7.64699       | 846,522       | 383,982   | 821,126                 | 372,463   | 0   | 0      | 821,126                  | 372,463   |
| NJ                 | 16.72499      | 1,851,456     | 839,821   | 1,795,913               | 814,626   | 0   | 0      | 1,795,913                | 814,626   |
| DE                 | 0.01779       | 1,969         | 893       | 1,910                   | 866       | 56,621  | 25,683 | -54,711                  | -24,816   |
| MD                 | 2.03910       | 225,728       | 102,390   | 218,957                 | 99,319    | 0   | 0      | 218,957                  | 99,319    |
| VA                 | 21.31676      | 2,359,765     | 1,070,390 | 2,288,972               | 1,038,278 | 0   | 0      | 2,288,972                | 1,038,278 |
| NC                 | 27.44584      | 3,038,254     | 1,378,152 | 2,947,107               | 1,336,808 | 0   | 0      | 2,947,107                | 1,336,808 |
| Total <sup>2</sup> | 100.00        | 11,070,001    | 5,021,353 | 10,737,901              | 4,870,712 | 86,381  | 41,514 | 10,706,231               | 4,856,265 |

<sup>1</sup> 2008 quota overage is determined through comparison of landings for January through October 2008, plus any landings in 2007 in excess of the 2007 quota (that were not previously addressed in the 2008 specifications) for each state. For Delaware, includes continued repayment of overharvest from 2008 and previous years.

<sup>2</sup> Total quota is the sum of all states having allocation. A state with a negative number has a 2009 allocation of zero (0). Kilograms are as converted from pounds and may not necessarily add due to rounding.

The Commission has established a system whereby 15 percent of each state's quota may be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery in a state 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 ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in these 2009 final summer flounder specifications because NMFS does not have authority to establish such subcategories.

#### Delaware Summer Flounder Closure

Table 1 indicates that, for Delaware, the amount of the 2008 summer flounder quota coverage (inclusive of overharvest from previous years) is greater than the amount of commercial quota allocated to Delaware for 2009. As a result, there is no quota available for 2009 in Delaware. The regulations at § 648.4(b) provide that Federal permit holders, as a condition of their permit, must not land summer flounder in any state that the Administrator, Northeast Region, NMFS (Regional Administrator), has determined no longer has commercial quota available for harvest. Therefore, effective January 1, 2009, landings of summer flounder in Delaware by vessels holding commercial Federal summer flounder fisheries permits are prohibited for the 2009 calendar year, unless additional quota becomes available through a quota transfer and is announced in the **Federal Register**. Federally permitted dealers are advised that they may not purchase summer flounder from federally permitted vessels that land in Delaware for the 2009 calendar year, unless additional quota becomes available through a transfer, as mentioned above.

#### Scup

This final rule implements the least restrictive (*i.e.*, highest associated harvest levels) analyzed by the Council. The Council recommended, and NMFS published in the October 28, 2008, proposed rule, an 11.70-million-lb (5,339-mt) scup Total Allowable Catch (TAC) and a 7.34-million-lb (3,329-mt) scup TAL. The rationale for so doing was that scup are under a rebuilding plan and, at the time the Council met in August, the best available information

indicated that scup rebuilding was behind the established rebuilding schedule. During the interim between the Council recommending a 2009 TAC and TAL for scup, the Northeast Fisheries Science Center (NEFSC) convened a Data Poor Stocks Working Group (DPWG) to review biological reference points for scup. The peer review body of the DPWG has preliminarily indicated that the revised biological reference points, the modeling framework used to generate those reference points, and resultant change in stock status are acceptable, now represent the best available information, and should be utilized to craft management advice. While the final peer review report will not be available until late January or early February 2009, NMFS is implementing the least restrictive/highest scup TAC/TAL alternative analyzed by the Council as the updated stock status information resulting from the DPWG indicate the scup stock status has improved substantially and is rebuilt (*i.e.*, now above the revised rebuilding biomass target). Amendment 14 to the FMP established a scup rebuilding plan based on a fixed  $F = 0.10$  approach. During the 2009 specification development, the Council considered establishing catch levels derived using the  $F = 0.10$  approach but selected a more precautionary TAC and TAL because the information available at the time indicated that scup were behind the rebuilding schedule. Because scup are no longer considered to be behind schedule, the additional precaution recommended by the Council is no longer necessary. NMFS considers the  $F = 0.10$  approach consistent with the intent of the FMP pending the release of the final DPWG report. When final reports are issued for the DPWG and scup stock status is officially updated using the revised biological reference points, NMFS may take additional action to further modify the 2009 scup specifications.

This rule implements a 15.54-million-lb (5,796-mt) scup TAC and an 11.18-million-lb (4,170-mt) scup TAL. The TAC is divided into commercial (78 percent) and recreational (22 percent) allocations, in accordance with the FMP; the respective discard estimates are then subtracted to yield the preliminary TAL. NMFS is not altering the RSA amount contained in the proposed rule because projects utilizing

that amount have already been subject to NOAA Grants Office review and preliminary approval. Therefore, after deducting 220,200 lb (100 mt) of RSA for the three conditionally selected research projects, the initial TAL is a commercial quota of 8,373,848 lb (3,123 mt) and a recreational harvest limit of 2,585,952 lb (965 mt). If a proposed project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the scup TAL through publication in the **Federal Register**.

The commercial TAC, discards, and TAL (commercial quota) are 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 recreational harvest limit is allocated on a coastwide basis. Consistent with the revised quota setting procedures established for the FMP (67 FR 6877, February 14, 2002), scup overages are determined based upon landings for the Winter I and Summer 2008 periods, plus any previously unaccounted for landings from the 2007 Winter II period (January–December 2007). Table 2 presents the final 2009 commercial scup quota for each period and the reported 2008 landings for the 2008 Winter I and Summer periods. There was no overage of the Winter I quota; however, an overage of 328,795 lb (149 mt) occurred during the Summer period. An additional 2,085 lb (946 kg) that was previously unaccounted for in the 2008 specifications quota adjustments for the scup Summer period will be added to the 2008 overage, resulting in a total 2009 Summer period quota deduction of 330,880 lb (150 mt).

On August 11, 2008 (73 FR 46554), NMFS announced a transfer of unharvested quota from the Winter I to the Winter II 2008 quota period. Per the quota accounting procedures, after June 30, 2009, NMFS will compile all available landings data for the 2008 Winter II quota period and compare the landings to the 2008 Winter II quota period allocation, as adjusted by the aforementioned transfer. Any overages will be determined, and deductions, if needed, will be made to the Winter II 2009 allocation and published in the **Federal Register**.

TABLE 2. SCUP PRELIMINARY 2008 COMMERCIAL LANDINGS BY QUOTA PERIOD

| Quota Period | 2008 Quota                                       |       | Reported 2008 Landings through 10/31/08 |       | Preliminary Overages as of 10/31/08 <sup>1</sup> |     |
|--------------|--|-------|---|-------|--|-----|
|              | lb   | mt    | lb                                      | mt    | lb   | mt  |
| Winter I     | 2,388,611  | 1,083 | 2,309,508                               | 1,048 | 0  | 0   |
| Summer       | 1,437,588  | 652   | 1,766,353                               | 801   | 330,880  | 150 |
| Winter II    | Overage adjustment, if necessary, occurs in 2009 |       |   |       |  |     |
| Total        | 4,670,204  | 2,118 | 4,075,861                               | 1,849 | N/A  | N/A |

<sup>1</sup>Includes additional 2007 overage of 2,085 lb (946 kg) previously unaccounted for in 2008 specifications and

Table 3 presents the commercial scup percent share, 2009 TAC, projected discards, 2009 initial quota (with and without the RSA deduction), overage deductions (as necessary), and initial possession limits, by quota period.

This final rule continues the status quo Winter I period (January–April) per-trip possession limit of 30,000 lb (13.6 mt), and a Winter II period (November–December) initial per-trip possession limit of 2,000 lb (907 kg). The Winter I

per-trip possession limit will be reduced to 1,000 lb (454 kg) when 80 percent of the commercial quota allocated to that period is projected to be harvested.

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TABLE 3. INITIAL COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2009 BY QUOTA PERIOD

| Quota Period       | Per-cent Share | Total Allowable Catch |       | Discards  |       | Initial Quota |       | Initial Quota less Overages (through 10/31/2008) <sup>1</sup> |       | Adjusted Quota less Overages and RSA |       | Possession Limits (Per Trip) <sup>2</sup> |        |
|--------------------|----------------|-----------------------|-------|-----------|-------|---------------|-------|---|-------|--------------------------------------|-------|---|--------|
|                    |                | lb                    | mt    | lb        | mt    | lb            | mt    | lb  | mt    | lb                                   | mt    | lb  | kg     |
| Winter I           | 45.11          | 5,467,873             | 2,480 | 1,614,938 | 732   | 3,852,935     | 1,749 | N/A   | N/A   | 3,777,443                            | 1,713 | 30,000                                    | 13,608 |
| Summer             | 38.95          | 4,721,207             | 2,142 | 1,394,410 | 632   | 3,326,797     | 1,509 | 2,995,917   | 1,853 | 2,930,733                            | 1,329 | N/A                                       | N/A    |
| Winter II          | 15.94          | 1,932,119             | 876   | 570,652   | 259   | 1,361,467     | 618   | N/A   | N/A   | 1,334,791                            | 605   | 2,000                                     | 907    |
| Total <sup>3</sup> | 100.0          | 12,121,200            | 5,498 | 3,580,000 | 1,623 | 8,541,200     | 3,842 | N/A   | N/A   | 8,373,848                            | 3,798 | N/A                                       | N/A    |

<sup>1</sup>See Table 1 for explanation of overages.

<sup>2</sup>The Winter I possession limit will drop to 1,000 lb (454 kg) upon attainment of 80 percent of that period's allocation. The Winter II possession limit may be adjusted (in association with a transfer of unused Winter I quota to the Winter II period) via notification in the Federal Register.

<sup>3</sup> Metric tons are as converted from pounds and may not necessarily add due to rounding. N/A=Not applicable.

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Consistent with the unused Winter I commercial scup quota rollover provisions at § 648.120(a)(3), this final rule maintains the Winter II possession

limit-to-rollover amount ratios that were in place since the 2007 fishing year, as shown in Table 4. The Winter II possession limit will increase by 1,500

lb (680 kg) for each 500,000 lb (227 mt) of unused Winter I period quota transferred, up to a maximum possession limit of 8,000 lb (3,629 kg).

TABLE 4. 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

This final rule implements the specification contained in the October 28, 2008, proposed rule: A 2.3-million-lb (1,043-mt) black sea bass TAL. The FMP specifies that the annual TAL is allocated 49 percent to the commercial sector and 51 percent to the recreational sector. After deducting 69,000 lb (31 mt) of RSA for the three conditionally selected research projects, the TAL is divided into a commercial quota of 1,093,190 lb (456 mt) and a recreational harvest limit of 1,137,810 lb (516 mt).

If a proposed project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the black sea bass TAL through publication in the **Federal Register**. Consistent with the revised quota setting procedures for the FMP, black sea bass overages are determined based upon landings for the period January–September 2008, plus any previously unaccounted for landings from January–December 2007. There were no overages for either period; thus, no overage deduction adjustment to the 2009 commercial quota is necessary.

### Comments and Responses

NMFS received three comments during the comment period for the October 28, 2008, proposed rule. One commenter supported the proposed summer flounder TAL and two commenters supported the RSA projects preliminarily approved for 2009.

*Comment 1:* An association that advocates for recreational fisheries objected to the RSA project approval process. This commenter stated support

for the intent of the RSA program and stated no specific objection to the 2009 preliminarily approved projects.

*Response:* The RSA approval process is not part of the specification rulemaking process. NMFS and the Council work cooperatively each year to identify research priorities and to determine which submitted proposals should be selected for eventual RSA funding through the NOAA Grants award process. The commenter's letter has been forwarded to both the Northeast Fisheries Science Center (NEFSC) and the Council's Research Steering Committee, as these groups are involved in the annual RSA project selection process and are better suited to address the concerns raised.

*Comment 2:* One commenter stated that a benchmark assessment is needed for black sea bass and that the current trawl index utilized is inadequate for determining exploitable biomass.

*Response:* The most recent black sea bass stock assessment was conducted in 2006 as part of the 43rd Northeast Regional Stock Assessment Workshop (SAW); this assessment was rejected by the independent peer review body because it did not provide an adequate basis to evaluate stock status against the biological reference points. The peer reviewers did not recommend any other reference points; thus, NMFS has continued use of the biological reference points contained in the FMP as the best available scientific information. This includes the index-based assessment approach utilized to evaluate the status of the stock for management purposes.

NMFS agrees that black sea bass is a data-poor stock and that the biology of

the fish makes assessments challenging. Currently, staff from the NEFSC, NMFS Northeast Regional Office, Council, Commission, and academia are conducting a series of working group meetings for data-poor stocks, including black sea bass, that may yield revised biological reference points. Peer-review of the working group recommendations will occur in December 2008 and final results are expected in late January or early February 2009.

*Comment 3:* One commenter supported the scup TAC, but disagreed with the commercial discard estimate utilized to derive the scup TAL.

*Response:* The discard estimates provided by the NEFSC, derived from at-sea observer data, are the only data available to assess the magnitude of scup discards in commercial fisheries. As such, the estimates constitute the best available scientific information, consistent with National Standard 2.

The Council and the NEFSC work cooperatively to prioritize observer coverage through the annual Standard Bycatch Reporting Methodology (SBRM) consultation process; however, observer resources are limited at this time. In addition, a working group has been formed that is composed of personnel from both Northeast regional fishery management councils and NMFS to explore additional observer funding options, including, but not limited to, cost recovery, industry funding, and alternative coverages such as video monitoring, to increase the level of observer coverage in some Northeast Region fisheries.

*Comment 4:* One commenter requested that the summer flounder

recreational fishery be managed separately from the commercial fishery with each having separate Annual Catch Limits (ACLs) and Accountability Measures (AMs). Specifically, the commenter requested that any recreational fishery overage be taken from the following year's recreational harvest limit as a pound-for-pound overage repayment.

*Response:* Under the current FMP structure, the commercial fishery has an annual quota that is 60 percent of the overall TAL. The recreational fishery receives 40 percent of the TAL as a recreational harvest limit. An amendment to the FMP would be required to enact the commenter's request. The Council is currently beginning development of an amendment to address ACLs and AMs for the FMP. The Council may consider having separate measures for commercial and recreational fishing modes and may also consider mode-specific AMs, such as overage repayment.

*Comment 5:* One commenter stated that overages in the summer flounder recreational fishery, wherein the annual recreational harvest limit is exceeded, compromises NMFS's ability to estimate probabilities for a given TAL's success. The commenter further suggests that this makes the probabilities provided inconsistent with the best available scientific information.

*Response:* NMFS agrees that when the basic assumptions involving the probability calculations are violated, the probability for achieving the annual management target (*i.e.*, success) can be compromised. It is for this reason that NMFS has been implementing only annual TALs with a higher than 50-percent probability of success when stock rebuilding stalled in the mid-2000s.

The 2008 summer flounder benchmark assessment conducted by the Southern Demersal Working Group (SDWG) recommended a management target ( $F_{40\text{ percent}}$ ) and threshold ( $F_{35\text{ percent}}$ ) approach. The rationale for this approach is that setting an ACL on a target allows for some amount of imprecision wherein the catch may result in an F above or below the target roughly 50 percent of the time. However, the catch should still remain below the threshold level at which the stock experiences overfishing. The Council agreed with this recommendation from the peer-reviewed stock assessment and set the 2009 TAL using the F target, creating a buffer between the 2009 projected F and the overfishing level F of the F threshold.

In addition, the Council acknowledged that there is some degree of imprecision in managing the summer flounder fishery and elected to recommend to NMFS a TAL that is lower than the SSC's recommendation for Acceptable Biological Catch (ABC). The reduction from the recommended ABC of 19.5 million lb (8,845 mt) to 18.45 million lb (8,369 mt) was deliberate, and designed to provide a buffer for uncertainties such as exceeding the recreational harvest limit. NMFS agrees that utilization of an F target approach in TAL setting, paired with the additional risk-averse approach of reducing TAL from ABC, should provide a very high likelihood that overfishing will not occur in 2009.

Specific management measures designed to constrain recreational harvest to the 2009 recreational harvest limit will be developed by the Council and Commission in December. NMFS agrees that it is of paramount importance that such measures be sufficient to ensure that the recreational harvest limit is not exceeded.

#### Classification

The Administrator, Northeast Region, NMFS, determined that this final rule is necessary for the conservation and management of the summer flounder, scup, and black sea bass fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for this rule, to ensure that the final specifications are in place on January 1, 2009. This action establishes specifications (*i.e.*, annual quotas) for the summer flounder, scup, and black sea bass fisheries and possession limits for the commercial scup fishery.

Preparation of the proposed rule was dependent on the submission of the EA/RIR/IRFA in support of the specifications which is developed by the Council. This document was received by NMFS in the last days of September 2008. Documentation in support of the Council's recommended specifications is required for NMFS to provide the public with information from the environmental and economic analyses as required in rulemaking. The proposed rule published on October 28, 2008, with a 15-day comment period ending November 12, 2008. Publication of the adjusted summer flounder quota at the start of the fishing year that begins January 1, 2009, is required by the order of Judge Robert Doumar in *North Carolina Fisheries Association v. Daley*.

If the 30-day delay in effectiveness were to be required, the lack of effective quota specifications on January 1, 2009, would present significant difficulties to both NMFS and individual states who manage these species cooperatively through the Commission. The summer flounder, scup, and black sea bass fisheries are all expected, based on historic participation and harvest patterns, to be very active at the start of the fishing season in 2009. Individual states would be unable to set commercial possession and/or trip limits which apportion the catch over the entirety of the calendar year. NMFS would be unable to control harvest in any way as there would be no quotas in place for any of the three species until the regulations are effective. NMFS would be unable to control harvest or close the fishery should landings exceed the quotas. In addition, the Delaware summer flounder fishery would be open for fishing but in a negative quota situation. All of these factors would result in a race for fish wherein uncontrolled landings would occur. Disproportionately large harvest occurring within the first weeks of 2009 would have distributional effects on other quota periods and would disadvantage some gear sectors or owners and operators of smaller vessels that typically fish later in the fishing season. There is no historic precedent by which to gauge the magnitude of harvest that might occur should quotas for these three species not be in place during the first weeks of 2009. It is reasonable to conclude that the commercial fishing fleet possesses sufficient capacity to exceed the established quotas for these three species before the regulations would become effective, should quotas not be in place on January 1, 2009. Should this occur, the stock rebuilding objectives for all three species rebuilding plans would be compromised.

This final rule has been determined to be not significant for purposes of Executive Order 12866 because this action contains no implementing regulations.

This final rule does not duplicate, conflict, or overlap with any existing Federal rules.

This FRFA was prepared pursuant to 5 U.S.C. 604(a), and incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support the action. A copy of the EA/RIR/IRFA is available from the Council (see **ADDRESSES**).



The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

### Final Regulatory Flexibility Analysis

#### *Statement of Objective and Need*

A description of the reasons why this action is being taken, and the objectives of and legal basis for this final rule are contained in the preambles to the proposed rule and this final rule and are not repeated here.

#### *Summary of Significant Issues Raised in Public Comments*

No changes to the proposed rule were required to be made as a result of public comments as most of the comments did not address specific issues in this rulemaking or the economic analyses summarized in the IRFA. For a summary of the comments received, and the responses thereto, refer to the "Comments and Responses" section of this preamble.

#### *Description and Estimate of Number of Small Entities to Which the Rule Will Apply*

The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal commercial or charter/party 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 2009 quotas could affect 2,263 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2007, the most recent year for which complete permit data exists. The more immediate impact of this final rule will likely be felt by the 891 vessels that actively participated (*i.e.*, landed these species) in these fisheries in 2007.

#### *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

#### *Description of the Steps Taken to Minimize Economic Impact on Small Entities*

Specification of commercial quotas and possession limits is constrained by the conservation objectives set forth in the FMP and implemented at 50 CFR part 648 under the authority of the Magnuson-Stevens Act. Economic impacts of reduced quota specifications, which reduce the number of fish that may be taken by participants of both

commercial and recreational fisheries, may be offset by adjustments to such measures as commercial fish sizes, changes to mesh sizes, gear restrictions, or possession and trip limits that may increase efficiency or value of the fishery. For 2009, no such adjustments were recommended by the Council; therefore, this final rule contains no such measures. Therefore, the economic impact analysis of the action is evaluated solely on the different levels of quota specified in the alternatives. The ability of NMFS to minimize economic impacts for this action is constrained to approving quota levels that provide the maximum availability of fish while still ensuring that the required objectives and directives of the FMP, its implementing regulations, and the Magnuson-Stevens Act, particularly the stock rebuilding requirements of all three species rebuilding plans, are met.

The economic analysis for the 2009 specification assessed the impacts for quota alternatives that achieve the aforementioned objectives. The no action alternative, wherein no quotas are established for 2009, was excluded from analysis because it is not consistent with the goals and objectives of the FMP and the Magnuson-Stevens Act. Implementation of the no action alternative in 2009 would substantially complicate the approved management programs for these three species. NMFS is required under the FMP's implementing regulations to specify and implement a TAL (and TAC for scup) for these fisheries on an annual basis. The no action alternative would result in no TAL (and no scup TAC) for 2009, and would likely result in overfishing of the resources and substantially compromise the stock rebuilding and/or mortality objectives for each species.

Furthermore, Alternative 2 from the Council's analysis contains the most restrictive TAL options (*i.e.*, the lowest catch levels). While this alternative would achieve the required objectives for all three species, it carries the highest potential negative impact on small entities in the form of foregone fishing opportunity. Alternative 2 was not preferred by the Council or NMFS because other alternatives considered have lower impacts on small entities while achieving the stated objectives of the 2009 specification process.

Alternative 3 (least restrictive quotas; highest catch levels) would produce the smallest impact on small entities. For summer flounder, the Alternative 3 TAL was consistent with the Council's SSC recommendation for ABC. The Council expressed concerns that setting the TAL equal to ABC would not provide any leeway for implementation imprecision,

and that the summer flounder stock has only 4 years remaining to achieve the rebuilding biomass objective. NMFS agrees that setting TAL equal to ABC while the stock is under a rebuilding plan and not yet rebuilt is not the most prudent course of action. For black sea bass, the Alternative 3 measures would retain the status quo. The black sea bass TAL under this alternative would be inconsistent with the rebuilding plan because the resulting landings level would be higher than permitted under the rebuilding plan's fishing mortality calculation. Therefore, while the summer flounder and black sea bass TALs of Alternative 3 may mitigate economic impacts on small entities by providing greater harvest opportunities, both the Council and NMFS find the resulting harvest levels to be inconsistent with the goals and objectives of the annual specifications and stock rebuilding programs.

Through this final rule, NMFS implements the summer flounder and black sea bass TALs contained in Alternative 1, the Council's preferred alternatives, which consist of the quota alternatives with an intermediate level economic impacts to small entities when compared to Alternatives 2 and 3 for those two species. NMFS also implements scup TAL Alternative 3, the least restrictive alternative analyzed by the Council, for the reasons outlined in the preamble to this rule (*i.e.*, change in stock status resulting from the DPWG findings in the interim months between the Council's recommendation and this final rule). Scup TAL Alternative 3 has the lowest economic impact to small entities when compared to Alternatives 1 and 2. Relative to 2008, the 2009 commercial quotas and recreational harvest measures in this action would result in the following TAL changes for the commercial and recreational sectors:

- (1) A 17.0-percent increase for summer flounder;
- (2) a 52.3-percent increase for scup; and
- (3) a 52.0-percent decrease for black sea bass.

TAL Alternatives 1 for summer flounder and black sea bass were selected because they satisfy NMFS's obligation to implement specifications that are consistent with the goals, objectives, and requirements of the FMP, its implementing regulations, and the Magnuson-Stevens Act. TAL Alternative 3 for scup was selected because it allows for an increase of the 2009 specifications above the level contained in the Council's recommended scup Alternative 1 and endorsed by NMFS in the proposed rule in reaction to the most recent peer-

reviewed information regarding stock status. This stock status information was not available when the Council deliberated 2009 TAL options in August, nor was the information available when NMFS published the proposed rule in October. The DPWG concluded its work in early December. As previously stated in the preamble, when final DPWG reports regarding stock are available in early 2009, NMFS may take additional action to modify the 2009 scup specifications implemented by this final rule. The Alternative 1 TAL for summer flounder is sufficiently risk-averse, providing a high probability that the rebuilding F rate and an even higher probability that the overfishing threshold ( $F_{35}$  percent) will not be exceeded in 2009. Given the regulatory and statutory requirements, Alternative 1 minimizes, to the extent practicable, the economic impacts on small entities that participate in the summer flounder fishery. The black sea bass quota in Alternative 1 was selected because it is consistent with the TAL calculation methodology of the rebuilding plan and results in a measure that will adequately constrain harvest in 2009, and provide continued rebuilding of the overfished stock. The scup TAL contained in Alternative 3 provides the maximum harvest level analyzed by the Council and is consistent with the revised stock status information verbally endorsed for management advice by the DPWG peer review panel. In addition, the scup Alternative 3 TAL remains consistent with F rate contained in the Amendment 14 scup rebuilding plan, which remains effective until formal advice is conveyed in the final DPWG reports.

The revenue decreases associated with the RSA program are expected to be minimal, and are expected to yield important benefits associated with improved fisheries data. It should also be noted that fish harvested under the RSA program would be sold, and the profits would be used to offset the costs of research. As such, total gross revenues to the industry will not decrease substantially, if at all, as a result of this final rule authorizing RSA for 2009.

#### *Small Entity Compliance Guide*

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall

explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the summer flounder, scup, and black sea bass fisheries. In addition, copies of this final rule and guide (*i.e.*, permit holder letter) are available from NMFS (see ADDRESSES) and at the following Web site: <http://www.nero.noaa.gov>.

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

Dated: December 24, 2008.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

[FR Doc. E8-31236 Filed 12-31-08; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 071106673-8011-02]

RIN 0648-XM47

#### Fisheries of the Exclusive Economic Zone Off Alaska; Inseason Adjustment to the 2009 Bering Sea Pollock Total Allowable Catch Amount

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

**ACTION:** Temporary rule; inseason adjustment; request for comments.

**SUMMARY:** NMFS is adjusting the 2009 total allowable catch amount (TAC) for the Bering Sea pollock fishery. This action is necessary because NMFS has determined this TAC is incorrectly specified. This action will ensure the Bering Sea pollock TAC does not exceed the appropriate amount based on the best available scientific information for pollock in the Bering Sea subarea. This action is consistent with the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP).

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), December 29, 2008, through 2400 hrs, A.l.t., December 31, 2009, unless otherwise modified or superceded through publication of a notification in the **Federal Register**.

Comments must be received at the following address no later than 4:30 p.m., A.l.t., December 29, 2008.

**ADDRESSES:** Send comments to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by "RIN 0648-XM47," by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at <http://www.regulations.gov>.

- Mail: P. O. Box 21668, Juneau, AK 99802.

- Fax: (907) 586-7557.

- Hand delivery to the Federal Building: 709 West 9<sup>th</sup> Street, Room 420A, Juneau, AK.

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 (e.g., name, address) 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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

**FOR FURTHER INFORMATION CONTACT:** Mary Furuness, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the FMP prepared by the North Pacific Fishery Management Council (Council) under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2009 pollock TAC in the Bering Sea subarea was set at 1,000,000 metric tons (mt) by the 2008 and 2009 harvest specification for groundfish in the BSAI (73 FR 10160, February 26, 2008).

In December 2008, the Council recommended a 2009 pollock TAC of 815,000 mt for the Bering Sea subarea. This amount is less than the 1,000,000 mt established by the final 2008 and 2009 harvest specification for groundfish in the BSAI (73 FR 10160, February 26, 2008). The TAC recommended by the Council is based on the Stock Assessment and Fishery Evaluation report (SAFE), dated November 2008, which NMFS has