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Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No. 030617155-3155-01; I.D. 051903D]

RIN 0648-AR11

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Weakfish Fishery

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to: increase the incidental catch allowance for weakfish caught in the Exclusive Economic Zone (EEZ) from 150 lb (67 kg) to no more than 300 lb (135 kg) per day or trip, whichever is longer in duration; remove Massachusetts and Connecticut from the list of states where commercially caught weakfish from the EEZ can be landed; and add to our regulations the Director, Office of Sustainable Fisheries, as an official who can grant Exempted Fishing Permits. The intent of this proposed rule is to modify regulations for the Atlantic coast stock of weakfish to promote the effectiveness of the Commission's Interstate Fishery Management Plan (ISFMP) for weakfish.

DATES: Written comments must be received on or before July 31, 2003.

ADDRESSES: Comments on the proposed rule should be sent to, and copies of a Draft Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), are available from, Anne Lange, Chief, State-Federal Fisheries Division (SF8), Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, Suite 13317, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Tom Meyer, 301-713-2334.

SUPPLEMENTARY INFORMATION:

Background

NMFS is proposing to modify weakfish conservation measures in the EEZ under the authority of section 803(b) of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), 16 U.S.C. 5101 *et seq.*, which states that, in the absence of an approved and implemented Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and, after consultation with the appropriate Fishery Management Council(s), the Secretary of Commerce (Secretary) may implement regulations to govern fishing in the EEZ, i.e., from 3 to 200 nm offshore. These regulations must be (1) compatible with the effective implementation of an ISFMP developed by the Commission, and (2) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

On November 21, 2002, the Commission approved and implemented Amendment 4 to the ISFMP for Weakfish (Amendment 4). Under Amendment 4, vessels fishing for weakfish must use mesh sizes of at least 3 $\frac{1}{4}$ -inch (8.3 cm) square stretch mesh or 3 $\frac{3}{4}$ -inch (9.5 cm) diamond stretch mesh for trawls and 2 $\frac{7}{8}$ -inch (7.3 cm) stretch mesh for gillnets. Vessels using smaller mesh sizes cannot target weakfish, but often take this species as bycatch (i.e. non-directed fisheries). During development of Amendment 4, some states expressed concern that increased numbers of weakfish are being discarded as bycatch in these non-directed fisheries. Although research on discard mortality for weakfish is not available, fishermen have indicated that most discards are dead, and therefore, discard mortality has been assumed to be 100 percent. To address this concern, Amendment 4 provides that states may allow fishermen targeting species other than weakfish to possess up to 300 lb (135 kg) of weakfish in any one day or trip, whichever is the longer period of time, as incidental catch in state waters, provided that there is at least an equal poundage of other species on board the vessel. This is an increase of 150 lb (67 kg) from the Amendment 3 incidental weakfish catch allowance of 150 lb (67 kg). Any state that chooses to implement a 300-lb (135-kg) allowance must have a reporting system in place that will allow adequate quantification of any such catch. State management plans must also account for any harvest of weakfish from non-directed fisheries. The required reporting systems will provide information on weakfish

bycatch that will be needed by the Commission and NMFS in developing future regulations. Such information is currently limited. The Commission believes that this increase in allowance will contribute little to total landings, while the required reporting systems will result in improved data for future stock assessments

Status of the Weakfish Fishery

Amendment 4 incorporates results of the most recent weakfish stock assessments, developed by the Atlantic Coastal States, the Commission, and NMFS (Section 1.2.2 of Amendment 4). The 30th Northeast Regional Stock Assessment Workshop, in 2000, reviewed the weakfish stock assessment and concluded that weakfish were at a high level of abundance and subject to low fishing mortality rates. The assessment was subsequently updated, in 2002, with data through 2000. Spawning stock biomass has been building since 1993, and is currently well above the threshold of 31.8 million lb (14,400 MT). Estimates of fishing mortality, which reached a high in 1994 of 2.52, have been below 0.50, since 1995. The 2000 estimate is below the fishing mortality target of 0.31 and far below the fishing mortality threshold of 0.50.

Management measures implemented under Amendment 3 resulted in an increase in the size and age structure of the weakfish population. The estimate of the proportion of age 6+ fish had shrunk to only 0.3 percent of the total number of weakfish in 1990. This proportion has been increasing in recent years, reaching 6.8 percent of the total number in 2001. Measures implemented under Amendment 4 are designed to continue the expansion of the weakfish age and size structure to that necessary for full restoration of the stock, and to return weakfish to their previous geographic range.

Recommendation to the Secretary

On March 13, 2003, the Secretary received the following two recommendations from the Commission to implement regulations under the Atlantic Coastal Act: (1) Require that fishermen who harvest weakfish recreationally in the EEZ comply with the laws of the state where they are landed; and (2) allow fishermen in non-directed fisheries using smaller than certain specified mesh sizes to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration (an increase of 150 lb (67 kg) per day or trip). These two recommendations were part of five measures approved under

Section 4.9 of Amendment 4, but the only two that the Commission believed required changes to the current Federal regulations.

Recommendation 1 would require that fishermen who harvest weakfish recreationally in the EEZ comply with the laws of the state where they are landed. NMFS believes that the current provisions at 50 CFR 697.3(c) ("The regulations in this part do not preempt more restrictive state laws, or state enforcement of more restrictive state laws, with respect to weakfish fishing and American lobster fishing") is compatible with the intent of this recommendation. If a state has a regulation that is more restrictive than the Federal regulation in the EEZ, the Federal regulation would apply in the EEZ but would likely not prohibit the state from enforcing its more restrictive state law upon landing in that state. Therefore, the Commission's recommendation is already in effect and a change to the current regulation is not required.

Recommendation 2 would allow non-directed fisheries using a mesh size less than 3 $\frac{1}{4}$ -inch (8.3 cm) square stretch mesh or 3 $\frac{3}{4}$ -inch (9.5 cm) diamond stretch mesh for trawls and 2 $\frac{7}{8}$ -inch (7.3 cm) stretch mesh for gillnets to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration (an increase of 150 lb (67 kg) per day or trip over the current Federal EEZ regulation). The Commission stated in its letter to the Secretary that an increase in weakfish biomass has resulted in greater weakfish discards, and that a 300 lb (135 kg) bycatch allowance will help to reduce dead discards, while not encouraging directed fishing. The Commission believes that this recommendation is compatible with Amendment 4.

Recommendation 2 is essentially a bycatch provision. Bycatch is defined in the Magnuson-Stevens Act as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards." In this case, since vessels fishing for weakfish are required to adhere to the minimum mesh sizes described above, vessels using the smaller mesh sizes cannot direct effort on this species. However, since vessels fishing with smaller mesh sizes are likely to encounter weakfish, any weakfish in excess of 300 lb (135 kg), taken by such vessels, would be considered bycatch under this recommendation. In addition, under Amendment 4, vessels fishing with smaller mesh sizes can retain up to the 300 lb (135 kg) weakfish bycatch

allowance in state waters, provided there is at least an equal poundage of other species on board the vessel. The provision for equal or greater poundage of other species is more restrictive than would be implemented in Federal waters. Any state that chooses to implement a 300-lb (135-kg) allowance must have a reporting system in place that will allow adequate quantification of any such catch. State management plans must also account for any harvest of weakfish from non-directed fisheries. The required reporting systems will provide information on weakfish bycatch that will be needed by the Commission and NMFS in developing future regulations. This recommendation requires a change to current Federal regulations.

Another of the five measures approved under Section 4.9 of Amendment 4 was that weakfish commercially harvested in the EEZ be landed in accordance with the landing laws of the state in which they are landed, with the exception that weakfish caught commercially in the EEZ may not be landed in a *de minimis* state. The Commission permits a state to apply for *de minimis* status if, for the previous two years, its combined average commercial and recreational landings (by weight) constitute less than 1 percent of the annual coastwide commercial and recreational landings of weakfish for the same two year period. The Federal definition is compatible. Once *de minimis* status is granted, designated states are relieved of many of the burdens for monitoring weakfish catches, but must submit annual reports to the Weakfish Management Board justifying the continuance of *de minimis* status. This recommendation was not included in the letter from the Commission since this provision is addressed in current regulations.

The Commission found, and the Secretary agrees, that the States of Massachusetts and Connecticut are now *de minimis* states within the definition of the term, and therefore, these states ought to be removed from the list of states where commercially caught weakfish from the EEZ can be landed (see 50 CFR part 697.7(a)(7)). This measure supports the ability of the states to effectively monitor landings.

Proposed Action

Pursuant to section 804(a) of the Atlantic Coastal Act, the Secretary has a statutory obligation to support the Commission's Interstate Fishery Management Program. The Commission recently adopted Amendment 4, which is designed to continue the stock recovery seen during the

implementation of Amendment 3, to benefit the ecosystem as well as commercial and recreational fisheries, and to continue to increase the age and size structure of the weakfish population, as well as its geographic range. In furtherance of this plan, the Commission requested Secretarial support in the form of a modification to the current Federal weakfish regulations. The recommended regulatory change would reduce dead discards (bycatch) by increasing the amount of incidental catch that can be landed, but by such a minimal amount that it would not encourage directed fishing. To support the Commission's weakfish management efforts under Amendment 4, NMFS proposes the following regulations that would modify management restrictions in the Federal weakfish fishery in a manner that is compatible with the recommendations made by the Commission. The proposed rule would allow vessels using a mesh size less than 3 $\frac{1}{4}$ -inch (8.3 cm) square stretch mesh or 3 $\frac{3}{4}$ -inch (9.5 cm) diamond stretch mesh for trawls and 2 $\frac{7}{8}$ -inch (7.3 cm) stretch mesh for gillnets to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration (an increase of 150 lb (67 kg) per day or trip over the current Federal EEZ regulation). In addition, the States of Massachusetts and Connecticut would be removed from the list of states where weakfish caught in the EEZ for commercial purposes can be landed (§ 697.7(a)(7)).

Two changes would be included in this rulemaking for consistency and ease of reading: (1) Under 50 CFR 697.22—Exempted fishing, the Regional Administrator is the only official who can exempt a person or vessel from the requirements of this part for the conduct of exempted fishing beneficial to the management of weakfish, pursuant to the provisions of 50 CFR 600.745 of this chapter. But, under 50 CFR 600.745, the Director, Office of Sustainable Fisheries has also been delegated this task. For consistency, the Director would be added to 50 CFR 697.22 as an official, along with the Regional Administrator, who can exempt a person or vessel from the requirements of this part; and (2) Atlantic Coastal Act would be added to the definition section at 50 CFR 697.2.

Classification

This proposed rule is published under the authority of the Atlantic Coastal Act. Paragraphs (A) and (B) of section 804(b)(1) authorizes the Secretary to implement regulations in the EEZ in the absence of a Magnuson-Stevens Act FMP. Such regulations must be

necessary to support a Commission's ISFMP, and consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act. The Assistant Administrator for Fisheries has preliminarily determined that these actions are consistent with the national standards. The Secretary, before making the final determination, will take into account data, views, and comments received during the comment period.

NMFS prepared an initial regulatory flexibility analysis (IRFA) that describes the impact that this proposed rule, if adopted, would have on small entities. A summary of the IRFA is as follows:

This proposed rule is published under the authority of section 803 of the Atlantic Coastal Act. The purpose of the proposed rule is to improve cooperative management of the Atlantic coast weakfish fishery by supporting the Commission's Amendment 4, as required under the Atlantic Coastal Act. The proposed Federal regulatory change would increase the permitted non-directed incidental catch of the species from 150 lb (67 kg) to no more than 300 lb (135 kg) per day or trip. Analysis of the best available data in the EA/RIR/IRFA suggests that the proposed increase would not alter current fishing practices or effort, or increase the number of weakfish caught. The 150-lb (67-kg) increase would simply convert 150 lb (67 kg) of weakfish, which would be caught and discarded at sea as dead bycatch, into 150 lb (67 kg) of weakfish caught as incidental catch and landed. The need for the proposed action is explained in the preamble to this proposed rule and is not repeated here.

Only two alternatives were considered for this proposed action. They were: Alternative 1: No Action; and Alternative 2 (Preferred Alternative): Allow vessels in non-directed fisheries, using mesh sizes less than 3¼-inch (8.3 cm) square stretch mesh or 3¾-inch (9.5 cm) diamond stretch mesh for trawls and 2⅞-inch (7.3 cm) stretch mesh for gillnets to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration. Although a third alternative was identified in the environmental assessment, it was considered to be not significant for purposes of this IRFA. Furthermore, because the Secretary is required to develop and implement a program to support the Commission's action, analysis of additional alternatives would not meet the purpose and need for this action, or objectives of the Atlantic Coastal Act.

The preferred alternative would allow vessels in non-directed fisheries, using a mesh size less than 3¼-inch (8.3 cm)

square stretch mesh or 3¾-inch (9.5 cm) diamond stretch mesh for trawls and 2⅞-inch (7.3 cm) stretch mesh for gillnets, to possess no more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer in duration (an increase of 150 lb (67 kg)).

NMFS does not have an estimate of the number of small entities to which the proposed action would apply because vessels most likely to be impacted are not required to hold a permit to fish for weakfish in the EEZ. However, the action would only apply to those fishermen who capture weakfish incidentally while fishing for other species using a smaller mesh size than is allowed in the directed weakfish fishery. In addition, under Alternative 1, status quo, no additional small entities would be impacted; while implementation of Alternative 2 would apply to fishermen who use nets with smaller mesh sizes and catch over 150 lb (67 kg) of weakfish on a given day or trip. During 1998–2002, vessel trip reports indicated that only 1,116 small mesh otter trawl trips and 4 small mesh gillnet trips landed weakfish caught while fishing in the EEZ. The average price received by fisherman reporting weakfish catch in the EEZ in 2001 was \$0.614 per lb. If an affected vessel were to land 150 lb (67 kg) of weakfish, as currently permitted (Alternative 1), \$92 in revenue could be realized, per trip. If Alternative 2 were implemented, an additional \$92 in revenue, for a weakfish total of \$184 per trip (double the current amount) would be possible. For a more accurate picture of the expected economic impacts for the two alternatives, actual catches from individual vessel trip records, from 1998–2002, were multiplied by average price-per-pound of weakfish from the EEZ to determine estimated revenues per trip. Since vessels may not catch the full 150 lb (67 kg) or 300 lb (135 kg) allowed in Alternative 1 and 2, revenues for each Alternative were projected as the average for those trips that reported from 1 to 150 lb (67 kg) (Alternative 1) and from 151 to 300 lb (135 kg) (Alternative 2). Catches from trips that reported over 300 lb (135 kg) were capped at the 300 lb (135 kg) proposed limit (Alternative 2) for these calculations. Calculated revenues for sale of allowed weakfish landings under Alternative 1 averaged \$22; potential revenues for Alternative 2 were estimated at \$160 per trip. Based on 1998–2002 vessel trip data, total annual revenues for all non-directed weakfish trips, coastwide are projected to be about \$6,200 under Alternative 1, and

about \$7,800, if Alternative 2 were to be implemented.

There will be no reporting and recordkeeping requirements resulting from this proposed action.

There are no Federal rules which may duplicate, overlap, or conflict with the proposed action.

NMFS is inviting the public to provide comment on the number of small entities that might be affected by this proposed action. NMFS will consider comments received during the public comment period for this proposed action that relate to the economic impacts of the preferred alternative before publishing the final action.

A copy of the IRFA is available from NMFS (see **ADDRESSES**).

NMFS has made a preliminary decision that this proposed rule is not significant for purposes of E.O. 12866. This proposed rule has been submitted to the Office of Management and Budget for review pursuant to E.O. 12866.

List of Subjects in 50 CFR Part 697

Fisheries, Fishing

Dated: June 25, 2003.

Rebecca J. Lent,

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

For the reasons set out in the preamble, 50 CFR chapter VI, part 697, is proposed to be amended as follows:

PART 697—ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

1. The authority citation for part 697 is revised to read as follows:

Authority: 16 U.S.C. 5101 *et seq.*

2. In § 697.2, the definition for "Atlantic Coastal Act" is added in alphabetical order to read as follows:

§ 697.2 Definitions.

* * * * *

Atlantic Coastal Act means the Atlantic Coastal Fisheries Cooperative Management Act, as amended (16 U.S.C. 5101 *et seq.*).

* * * * *

3. Section 697.7, paragraph (a)(4) and (a)(7) are revised to read as follows:

§ 697.7 Prohibitions.

(a) * * *

(4) Possess more than 300 lb (135 kg) of weakfish during any one day or trip, whichever is longer, in the EEZ when using a mesh size less than 3¼-inch (8.3 cm) square stretch mesh (as measured between the centers of opposite knots when stretched taut) or 3¾-inch (9.5 cm) diamond stretch mesh

for finfish trawls and 2⁷/₈-inch (7.3 cm) stretch mesh for gillnets.

* * * * *

(7) Land weakfish for commercial purposes caught in the EEZ in any state other than Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, or North Carolina.

4. Section 697.22 is revised to read as follows:

§ 697.22 Exempted fishing.

The Regional Administrator or Director may exempt any person or vessel from the requirements of this part for the conduct of exempted fishing beneficial to the management of the American lobster, weakfish, Atlantic striped bass, Atlantic sturgeon, or

horseshoe crab resource or fishery, pursuant to the provisions of § 600.745 of this chapter.

(a) The Regional Administrator or Director may not grant such exemption unless it is determined that the purpose, design, and administration of the exemption is consistent with the objectives of any applicable stock rebuilding program, the provisions of the Atlantic Coastal Act, the Magnuson-Stevens Act, and other applicable law, and that granting the exemption will not:

(1) Have a detrimental effect on the American lobster, Atlantic striped bass, weakfish, Atlantic sturgeon, or horseshoe crab resource or fishery; or

(2) Create significant enforcement problems.

(b) Each vessel participating in any exempted fishing activity is subject to all provisions of this part, except those explicitly relating to the purpose and nature of the exemption. The exemption will be specified in a letter issued by the Regional Administrator or Director to each vessel participating in the exempted activity. This letter must be carried aboard the vessel seeking the benefit of such exemption. Exempted fishing activity shall be authorized pursuant to and consistent with § 600.745 of this chapter.

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