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National Oceanic and Atmospheric Administration

50 CFR Part 648

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Framework Adjustment 6 and Specifications and Management Measures; Final Rules

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

[Docket No. 120307159–2329–01]

RIN 0648–BB99

**Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Framework Adjustment 6**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is modifying the Mid-Atlantic Fishery Management Council's risk policy regarding stocks without an overfishing limit. Framework Adjustment 6 was initiated by the Mid-Atlantic Fishery Management Council in order to clarify its tolerance for risk for such stocks. The modification will allow increases of the acceptable biological catch for stocks that have stable or increasing trends in abundance, and for which there is robust scientific information to suggest that an increased acceptable biological catch will not lead to overfishing.

**DATES:** Effective on August 24, 2012.

**ADDRESSES:** Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Supplemental Environmental Assessment (EA) and the Regulatory Impact Review (RIR), for Framework Adjustment 6, and the Omnibus Annual Catch Limits and Accountability Measure Amendment EA/RIR, are available from: John K. Bullard, Northeast Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Internet at <http://www.nero.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:** Aja Szumylo, Fishery Policy Analyst, 978–281–9195, fax 978–281–9135.

**SUPPLEMENTARY INFORMATION:****Background**

NMFS published a proposed rule for Framework Adjustment 6 on June 28, 2012 (77 FR 38566). Additional background information and detail on why and how Framework Adjustment 6 was developed are included in the proposed rule, and are not repeated here. The Council established acceptable biological catch (ABC) control rules (implementing regulations

at 50 CFR 648.20) and a risk policy (§ 648.21) to guide the Council's Scientific and Statistical Committee (SSC) in its ABC setting process for all Council fishery management plans (FMPs) in the recently implemented Omnibus Amendment for Annual Catch Limits and Accountability Measures (October 31, 2011; 76 FR 60606). The Council's original risk policy did not permit increases to the ABC for stocks that lack an overfishing limit (OFL) derived either from the stock assessment, or through the SSC ABC recommendation process. Framework Adjustment 6 modifies the risk policy regarding stocks without an OFL or OFL proxy to allow the SSC to recommend increases to the ABC for stocks that have stable or increasing trends in abundance, and for which the SSC can point to robust scientific information to suggest that an increased ABC will not lead to overfishing. The adjustment to this policy does not change the Council's approach to stocks without an OFL that have declining biomass, or for which the SSC cannot point to scientific evidence to suggest that the recommended ABC will not result in overfishing.

Though this action only modifies the MSB FMP, the adjusted risk policy applies to all of the Council's managed species, including Atlantic mackerel, butterfish, Atlantic bluefish, spiny dogfish, summer flounder, scup, black sea bass, Atlantic surfclam, ocean quahog, and tilefish. The regulations for the ABC control rules and risk policy reside in the MSB FMP, but are a product of the Omnibus Amendment, which affected all of the FMPs for the above-listed species. The provisions in the Omnibus Amendment, including the risk policy, do not apply to longfin squid or *Illex* squid; these species are exempt from these requirements because they have a life cycle of less than 1 year. It is only necessary to complete this action as a framework adjustment to the MSB FMP because the ABC control rules and risk policy are incorporated by reference into the regulations for all other Council species.

**Comments and Responses**

NMFS received a total of four comments on the proposed rule for Framework Adjustment 6 from: Lund's Fisheries, Inc., a processing facility in Cape May, NJ; the Garden State Seafood Association (GSSA), a New Jersey-based commercial fishing industry group; the Herring Alliance, which represents 52 organizations concerned about the status of the Atlantic Coast's forage fish; and the Natural Resources Defense Council (NRDC).

*Comment 1:* Lund's Fisheries, Inc., and GSSA supported Framework Adjustment 6. They noted that this action will clearly define the Council's risk policy and retain the integrity of the SSC scientific review process, while providing the SSC with the needed flexibility to set ABCs in data-poor situations. GSSA noted that the SSC should be allowed to analyze and use all available scientific data when recommending ABC, and should not be constrained because no OFL can be derived. Lund's Fisheries, Inc., and GSSA supported the requirement that the SSC must justify its decision by providing a description of why the increase is warranted, how it arrived at the increase, and certify why overfishing will not occur. Lund's Fisheries, Inc., asserted that, under these strict requirements, any fear that the SSC would greatly inflate the ABC without scientific justification is unwarranted.

*Response:* NMFS agrees that it is the Council's prerogative to define its risk policy to communicate its tolerance for risk in ABC recommendations to the SSC, provided that its risk policy complies with the Magnuson-Stevens Act. The Council's revisions to the risk policy do comply with the Magnuson-Stevens Act because the SSC is still confined to specific criteria in setting an ABC that does not pose the risk of overfishing for a given stock. Further, the Council and NMFS will review SSC ABC recommendations to ensure that the revised risk policy is applied appropriately.

*Comment 2:* The Herring Alliance and NRDC urged NMFS to disapprove Framework Adjustment 6. They noted that the Council is proposing a significant modification to its risk policy that would sanction a more risk-prone approach to managing stocks lacking an OFL. Further, the Herring Alliance argued that the proposed changes to the risk policy would nullify the policy for Level 4 stocks (those stocks with the lowest certainty in scientific information), leaving those species vulnerable to overfishing, which is incongruous with the objectives of the Omnibus Amendment, the National Standard 1 guidelines, and the Magnuson-Stevens Act.

*Response:* The adjustment would only allow increases for Level 4 stocks that have had stable or increasing trends in abundance, and stocks for which the SSC could certify that its ABC recommendation is not likely to result in overfishing. NMFS disagrees that the adjustment to this policy would nullify the risk policy for all Level 4 stock. Framework Adjustment 6 does not

change the Council's approach to stocks without an OFL/OFL proxy that have evidence of biomass declines or for which the SSC cannot point to scientific evidence to suggest that the recommended ABC will not result in overfishing.

Neither the Magnuson-Stevens Act nor the National Standard 1 guidelines have language prohibiting increases in ABC in the absence of an OFL. The National Standard 1 guidelines do advise that, when possible, the determination of an ABC should be based on the probability that an actual catch equal to the stock's ABC would result in overfishing (see § 600.310(f)(4)), but make no mention of how a Council should proceed when it is not possible to establish an OFL or OFL proxy. Each Council may determine the acceptable level of risk of overfishing (which overall must be below 50 percent, according to Magnuson-Stevens Act; § 600.310(f)(4)). In this case, the Council is further defining its risk tolerance for certain stocks without an OFL or OFL proxy.

*Comment 3:* Lund's Fisheries, Inc., commented that the application of this policy as it pertains to the final 2012 butterflyfish specifications is urgent. It urged NMFS to immediately publish a final rule implementing Framework 6 and waive the delay in effectiveness so that the final 2012 butterflyfish specifications can be published prior to the start of the Trimester III longfin squid fishery. It argued that a delay in publication would result in negative economic impacts to the squid fishery, and that a waiver would not pose any threat to overfishing the butterflyfish resource.

*Response:* NMFS agrees that the approval of Framework 6 has immediate implications for the longfin squid fishery, but clarifies that, regardless of the immediate implications of this action, the revisions to the risk policy will apply to all Council-managed species that may lack an OFL in the future. NMFS published a proposed rule (October 26, 2011; 76 FR 66260) with the Council's original 2012 butterflyfish ABC recommendation (3,622 mt) because, in the absence of the risk policy, the SSC's advice to increase the butterflyfish ABC (from 1,811 mt in 2011) was otherwise well justified (see response to Comment 6). A comment on the proposed rule pointed out that increases to the butterflyfish ABC were prohibited by the Council's risk policy, and we addressed this inconsistency by publishing the status quo specification in an interim final rule (March 21, 2012; 77 FR 16472). In response to our interim final rule for butterflyfish, the Council

initiated Framework 6 to revise its risk policy for all Council-managed species. The timing of Framework 6 coincides with the start of Trimester III for longfin squid (September 1–December 31), which, under the existing butterflyfish specifications, would not open because the total annual butterflyfish mortality cap on the longfin squid fishery (1,436 mt) has been attained. Framework 6 provides the authority to implement the Council's original 2012 recommendation for butterflyfish specifications in a final rule, which could allow the Trimester III longfin squid fishery to open on schedule by increasing the butterflyfish mortality cap (to 2,445 mt).

*Comment 4:* The Herring Alliance argued that Framework 6 was developed solely as a result of the first application of the risk policy to the 2012 butterflyfish specifications. It asserted that NMFS should not approve a rushed Council decision solely on a single ABC specification experience. It commented that, rather than bypassing its own policy, the Council should work to develop OFLs for all Level 4 stocks in order to set ABCs that comply with the current risk policy, as the SSC did for butterflyfish for the 2013 fishing year. It noted that, in order for the SSC to certify that an ABC will not lead to overfishing, it will need to perform an analysis of all relevant scientific information about the status of the stock to determine whether quota increases will lead to overfishing. It argues that this level of analysis is equivalent to the development of an OFL proxy.

*Response:* NMFS reiterates that the adjustment to the risk policy in Framework 6 applies to all of the Council's managed species. While the process to initiate the change was started in response to the 2012 specifications experience with butterflyfish, the Council worked to devise a revision to the risk policy that would allow the SSC to use all available information when making ABC recommendations for any situation where a Council-managed species does not have an OFL available from the assessment.

The SSC has noted its preference to have an OFL estimate that is based on the assessment, which takes into account all information about population dynamics that is available at the time (see Framework Adjustment 6 discussion at April 2012 Council meeting). It noted that, rather than deriving an OFL proxy when an OFL is unavailable from the assessment, its preference is to simply set an ABC that it believes would not lead to overfishing based on all other available evidence.

NMFS agrees that this approach is valid, provided that sufficient scientific evidence is presented in the SSC's deliberations to suggest that its recommendation will not result in overfishing of the stock in question. As further support for this approach, the National Standard 1 guidelines at § 600.310(f)(3) note that while NMFS expects that in most cases a recommended ABC should be reduced from the OFL to reduce the probability of overfishing, the ABC may be set equal to the OFL. Again, NMFS expect the SSC and the Council to present very strong justification for such cases (§ 600.310(f)(5)).

*Comment 5:* The NRDC asserted that ad hoc approaches to developing ABC recommendations that have not been vetted by independent experts lack transparency and rigorous independent evaluation, and thus do not represent the best available scientific information. The NRDC asserted that is especially the case given that more rigorous methods for estimating reference points for data-poor stocks are available. It noted that the SSC's ABC recommendations for the 2012 and 2013 specifications are prime examples of the dangers of ad hoc decision making. The NRDC commented that the Council and NMFS should adopt a policy with specific criteria and characteristics for which methods are acceptable for determining OFLs or OFL proxies for data-limited stocks.

*Response:* The SSC is expected to conduct its ABC recommendation process in an open, transparent public forum and to provide detailed documentation for the Council and public that provides the information considered, the approaches taken, and why the recommended ABC is consistent with the best available scientific information. Thus, provided that the SSC can demonstrate that the method that it uses for a given stock is defensible and will not result in overfishing for the stock in question, NMFS does not believe that it is necessary to define a list of criteria or characteristics of methods that are acceptable for determining OFLs or OFL proxies for data-limited stocks.

*Comment 6:* The NRDC criticized the SSC's recommended butterflyfish ABCs for both the 2012 and 2013 fishing years. It noted that the SSC doubled the 2012 ABC based on a NOAA Technical Memorandum used to set ABCs for stocks that only have reliable catch information, but did not apply the recommended methodology in the memorandum properly, and the SSC's subsequent reaffirmation of their 2012 ABC recommendation under the provisions in Framework 6. It also

criticized the SSC's butterflyfish ABC recommendation for the 2013 fishing year. Further, it noted that the change in the risk policy being proposed in Framework Adjustment 6 would encourage more of this type of rushed decision making, which will in turn increase the risk of overfishing for the stocks with the greatest uncertainty regarding stock status and productivity.

In contrast, Lund's Fisheries, Inc., and GSSA supported the Council's 2012 butterflyfish recommendations. They noted that any increases in butterflyfish catch would be expected to be very small relative to the actual increase in butterflyfish abundance. They also asserted that the chances of overfishing the butterflyfish resource under the modest quota increases initially proposed by the Council and NMFS in the proposed rule for 2012 butterflyfish specifications are, by SSC estimates, extremely low.

*Response:* NMFS does not believe that Framework 6 will lead to rushed decision making. Again, the SSC is still confined to a specific set of criteria in setting an ABC that does not pose the risk of overfishing for a given stock. The final implementation of specifications for Council-managed species is the culmination of a lengthy process that involves input from the SSC, the Council, the Northeast Fisheries Science Center, and NMFS policy staff. The Council may recommend a more conservative ABC than that recommended by the SSC if it feels that the SSC's recommendation does not adequately safeguard against overfishing. Further, NMFS can implement alternative specifications, should our review determine that the Council's recommendation is out of compliance with National Standard 1.

NMFS notes that the merits of the SSC's ABC recommendations for the 2012 and 2013 fishing years are not the subject of this rulemaking, but offers some discussion of these issues because of their relevance to Framework 6. With regard to the SSC's 2012 ABC recommendation, the NRDC references NOAA Technical Memorandum NMFS-SEFSC-616 (Calculating Acceptable Biological Catch for Stocks that have Reliable Catch Data Only (Only Reliable Catch Stocks—ORCS; 2011)). The memorandum was developed by a Working Group comprised of representatives from seven of the eight SSCs, five of the six NMFS Science Centers, NMFS Headquarters, academic institutions, a state agency, and a non-governmental organization to offer guidance that can be used to set ABCs for stocks that only have reliable catch data, are lightly fished, and appear to have stable or increasing trends. The

SSC noted that the butterflyfish stock met the criteria outlined for this approach, and relied on the concepts in this guidance document in developing its ABC recommendation. The report recommends doubling catch during a stable period to create an OFL, setting the ABC at 50 to 90 percent of the OFL, and then tracking the stock to see how the adjusted catch levels affect abundance. During its public process, the SSC discussed that, given that butterflyfish fishing mortality was likely contributing very little to changes in stock abundance, the ABC could be doubled and still yield a fishing mortality rate that would not affect stock size. The SSC also commented during Council deliberations that establishing an OFL or OFL proxy would not have changed its ABC recommendation for 2012. NMFS considered the SSC's rationale for increasing the butterflyfish ABC and found it to be appropriate and well supported by the best available scientific information. The SSC was guided by NOAA Technical Memorandum NMFS-SEFSC-616, and used its scientific judgment to recommend an ABC that was expected to result in a level of fishing mortality documented in SAW 49, and, as noted by the SSC, was not expected to result in overfishing of the butterflyfish resource.

NMFS notes that, since the initiation of Framework Adjustment 6, the SSC reaffirmed its original 2012 butterflyfish ABC recommendation of 3,622 mt (originally recommended in May 2011) at their May 2012 meeting in accordance with the provisions in Framework Adjustment 6, and the Council reaffirmed their original suite of recommended specifications (originally recommended in June 2011) at its June 2012 meeting. As noted in the response to Comment 3, NMFS will publish a rule to finalize butterflyfish specifications shortly.

Comments on the Council's 2013 specifications recommendations will be addressed in the 2013 specifications process. The SSC recommended a 2013 butterflyfish ABC to the Council at its May 2012 meeting, and the Council adopted the SSC's recommendation, along with butterflyfish specifications and management measures, at its June 2012 meeting. The Council is finalizing its recommendation, which will be submitted to NMFS for review and rulemaking. NMFS clarifies that the SSC did not rely on the provisions in Framework Adjustment 6 for its 2013 butterflyfish ABC recommendation because it was able to develop an OFL proxy during its deliberations.

*Comment 7:* The Herring Alliance argued that such a regressive change to the risk policy requires full consideration through an FMP amendment, rather than through a framework adjustment. It noted that the Omnibus Amendment clearly specifies that any significant changes are not appropriate under the limited public process of a framework adjustment. The Herring Alliance acknowledged that the Omnibus Amendment does allow for changes to a limited list of its provisions through the framework adjustment process, but claims that changes to the risk policy are not included in that list for any of the Council-managed species. The Herring Alliance argued that the adjustment to the risk policy proposed in Framework Adjustment 6 is an entirely new concept that was not previously contemplated by the Council, and that the proposed deviation to the risk policy is different from the provisions already in place for the Council to deviate from the ABC control rules. It claimed that, since the proposed changes to risk policy are a complete reversal of the Council's original guidance for Level 4 stocks, it cannot be characterized as a minor adjustment.

*Response:* This action does not introduce a new concept, and is not a significant departure from the Council's existing risk policy, but rather a clarification of the Council's intent regarding stocks with increasing trends for which an OFL cannot be established. Similar discussion regarding departure from the Council's established ABC control rules is included in the NS1 Guidelines (§ 600.310(f)(3)) and in the ABC control rule regulations at § 648.20. The Council felt that the flexibility provided to the SSC in the ABC control rules was in conflict with the lack of flexibility in its existing risk policy. Because the risk policy and ABC control rules are meant to work in concert, the Council initiated Framework Adjustment 6 to perfect and clarify its guidance to the SSC.

Framework Adjustment 6 does not change the Council's approach for all Level 4 stocks, and only allows the SSC to recommend ABC increases for Level 4 stocks under very limited circumstances. Stocks without an OFL or OFL proxy that have evidence of biomass declines or for which the SSC cannot point to scientific evidence to suggest that the recommended ABC will not result in overfishing will still be bound by the original risk policy.

Adjustments to the existing Council risk policy can be addressed through the framework process for all Council-managed species (see § 648.25(a)(1) for

mackerel and butterfish; § 648.79(a)(1) for surfclam and ocean quahog; § 648.110(a)(1) for summer flounder; § 648.130(a)(1) for scup; § 648.149(a)(1) for black sea bass; § 648.167(a)(1) for bluefish; § 648.239(a)(1) for spiny dogfish; and § 648.299(a)(1)(x) for tilefish). Given that the adjustment will only apply in limited circumstances, and given that no other provisions of the Omnibus Amendment are altered by this action, this change is minor enough to have been addressed in a framework adjustment rather than through a plan amendment. The analytical requirements to complete this action as a framework adjustment or an amendment are the same, and the Council prepared the necessary analytical requirements for this action in the form of a Supplemental Environmental Assessment. The primary difference is the amount of time that it takes to complete an amendment as compared to a framework adjustment. The Council process for this framework adjustment was completed over two Council meetings (February 2012 and April 2012). In contrast, an amendment would take several additional months for completion. The public was provided the required notice for Council meetings for this framework adjustment, and the meetings were open to public participation and offered the public sufficient opportunity to comment on the measures being considered. Finally, this framework adjustment underwent the proposed and final rulemaking processes to allow the public additional opportunity to comment.

#### Classification

The Administrator, Northeast Region, NMFS, determined that this framework adjustment to the Atlantic Mackerel, Squid, and Butterfish; Atlantic Bluefish; Spiny Dogfish; Summer Flounder, Scup, and Black Sea Bass; Surfclam and Ocean Quahog; and Tilefish FMPs is necessary for the conservation and management of the Atlantic mackerel, butterfish, Atlantic bluefish, spiny dogfish, summer flounder, scup, black sea bass, surfclam, ocean quahog, and tilefish 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 section 553(d) of the Administrative Procedure Act to waive the 30-day delay in effectiveness for this action because delaying the effectiveness of this rule would be contrary to the public interest. Immediate implementation of Framework Adjustment 6 will allow for the increase in the butterfish mortality

cap on the longfin squid fishery to 2,445 mt (a 1,009-mt increase from status quo) through the implementation of the final 2012 butterfish specifications. The Council initiated process for Framework Adjustment 6 at its February 2012 meeting, which was the first Council meeting after it realized that its risk policy may need further clarification with respect to stocks without an overfishing limit. The timeline that this action has followed has been the fastest possible given statutory requirements, and happens to coincide with the start of Trimester III for longfin squid. By the time the longfin squid fishery closed on July 10, 2012, in Trimester II, over 100 percent of the status quo annual allocation of the butterfish mortality cap was estimated to have been taken. Because the butterfish mortality cap closes the longfin squid fishery in Trimester III when 90 percent of the annual butterfish cap allocation has been taken, under the status quo allocation, the longfin squid fishery would not be opened at the start of Trimester III on September 1, 2012. The increased butterfish mortality cap implemented through the final 2012 butterfish specifications will allow for the longfin squid fishery to operate during Trimester III. Longfin squid migrate throughout their range and have sporadic availability. The fleet is quick to target longfin squid aggregations when they do appear, and is capable of landing over 550 mt in a single week. Analysis of this year's fishing activity indicates that longfin squid was particularly abundant this spring and summer, and historical availability patterns suggest that longfin squid abundance could still be high in the early fall. Only 7,761 mt of the 22,220 mt longfin squid quota has been harvested this year, meaning that well over half of the quota remains to be harvested during the final 4 months of the fishing year. A 30-day delay in the implementation of this rulemaking, and thus a delay in the implementation of the final 2012 butterfish specifications, may prevent fishermen from accessing longfin squid when it is temporarily available within portions of its range and prevent the harvest of a significant amount of longfin squid quota (up to 2,220 mt of the remaining 14,459 mt of longfin squid quota), negating any benefit of implementing this rule.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action

would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

#### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: August 21, 2012.

**Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, Performing the Functions and Duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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

#### PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.21, paragraph (d) is revised to read as follows:

#### § 648.21 Mid-Atlantic Fishery Management Council risk policy.

\* \* \* \* \*

(d) *Stock without an OFL or OFL proxy.* (1) If an OFL cannot be determined from the stock assessment, or if a proxy is not provided by the SSC during the ABC recommendation process, ABC levels may not be increased until such time that an OFL has been identified.

(2) The SSC may deviate from paragraph (d)(1) of this section, provided that the following two criteria are met: Biomass-based reference points indicate that the stock is greater than  $B_{MSY}$  and stock biomass is stable or increasing, or if biomass based reference points are not available, best available science indicates that stock biomass is stable or increasing; and the SSC provides a determination that, based on best available science, the recommended increase to the ABC is not expected to result in overfishing. Any such deviation must include a description of why the increase is warranted, description of the methods used to derive the alternative ABC, and a certification that the ABC is not likely to result in overfishing on the stock.

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