

period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(c) *Income tax withheld from wages—*  
(1) *Overcollection ascertained before return is filed.* If an employer collects more than the correct amount of income tax required to be withheld from wages, and if the employer ascertains the error before filing the return on which the tax is required to be reported, and repays or reimburses the employee under § 31.6413(a)–1(b)(1), the employer shall not report on any return or pay to the IRS the amount of the overcollection. If the employer does not repay or reimburse the amount of the overcollection under § 31.6413(a)–1(b)(1) before filing the return, the employer must report the amount of the overcollection on the return. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (c)(2) of this section.

(2) *Error ascertained after return is filed.* If an employer files a return for a return period on which income tax required to be withheld from wages is required to be reported and reports on the return more than the correct amount of income tax required to be withheld, and if the employer ascertains the error after filing the return, and repays or reimburses the employee in the amount of the overcollection as provided in § 31.6413(a)–1(b)(2), the employer may correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required in paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section. If the amount of the overcollection is not repaid or reimbursed to the employee under § 31.6413(a)–1(b)(2), there is no overpayment to be adjusted under this section. However, the employer may adjust an overpayment of tax attributable to an administrative error, that is, an error involving the inaccurate reporting of the amount withheld, pursuant to this section. The employer shall take the adjusted amount as a credit towards payment of employment

tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(d) *Adjustments not permitted—*(1) *In general.* If an adjustment cannot be made, a claim for refund or credit may be filed in accordance with § 31.6402(a)–2 or § 31.6414–1.

(2) *90-day exception.* No adjustment in respect of an overpayment may be made if the overpayment relates to a return period for which the period of limitations on credit or refund of such overpayment will expire within 90 days of filing the adjusted return.

(3) *No adjustment after claim for refund filed.* No adjustment in respect of an overpayment may be made after the filing of a claim for credit or refund of such overpayment under § 31.6402(a)–2.

(4) *No adjustment after IRS notification.* No adjustment may be made upon notification by the IRS that the adjustment is not permitted.

■ **Par. 12.** Section 31.6414–1 is amended by revising paragraph (a) to read as follows:

**§ 31.6414–1 Credit or refund of income tax withheld from wages.**

(a) *In general.* (1) Any employer who pays to the IRS more than the correct amount of income tax required to be withheld from wages under section 3402 or interest, addition to the tax, additional amount, or penalty with respect to such tax, may file a claim for refund of the overpayment in the manner and subject to the conditions stated in this section on the form prescribed by the IRS. The claim for refund must designate the return period to which the claim relates, explain in detail the grounds and facts relied upon to support the claim, and set forth such other information as may be required by the regulations in this section and by the instructions relating to the form used to make such claim. No refund to the employer will be allowed under this section for the amount of any overpayment of tax which the employer deducted or withheld from an employee.

(2) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041–2 and 31.6051–1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041–2 and 31.6051–2.

(3) For interest-free adjustments of overpayments of income tax withheld from wages, see § 31.6413(a)–2.

\* \* \* \* \*

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

■ **Par. 13.** The authority citation for part 602 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805.

■ **Par. 14.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers**

\* \* \* \* \*

(b) \* \* \*

CFR part or section where identified and described	Current OMB control No.
* * * * *	* * * * *
31.6011(a)–1 .....	1545–2097
31.6011(a)–4 .....	1545–2097
31.6011(a)–5 .....	1545–2097
31.6205–1 .....	1545–2097
31.6402(a)–2 .....	1545–2097
31.6413(a)–1 .....	1545–2097
31.6413(a)–2 .....	1545–2097
31.6414–1 .....	1545–2097
* * * * *	* * * * *

**Linda E. Stiff,**  
*Deputy Commissioner for Services and Enforcement.*

Approved: June 23, 2008.

**Eric Solomon,**  
*Assistant Secretary of the Treasury (Tax Policy).*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[Docket No. 071219865–8771–02]

**RIN 0648–AP60**

**Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 9**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing approved measures contained in

Amendment 9 to the Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery Management Plan (FMP). Amendment 9 was developed by the Mid-Atlantic Fishery Management Council (Council) to remedy deficiencies in the FMP and to address other issues that have arisen since Amendment 8 to the FMP became effective in 1999. Amendment 9 establishes multi-year specifications for all four species managed under the FMP (mackerel, butterfish, *Illex* squid (*Illex*), and *Loligo* squid (*Loligo*)) for up to 3 years; extends the moratorium on entry into the *Illex* fishery, without a sunset provision; adopts biological reference points recommended by the Stock Assessment Review Committee (SARC) for *Loligo*; designates essential fish habitat (EFH) for *Loligo* eggs based on best available scientific information; and prohibits bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons.

**DATES:** Effective July 31, 2008.

**ADDRESSES:** A final supplemental environmental impact statement (FSEIS) was prepared for Amendment 9 that describes the proposed action and other considered alternatives and provides a thorough analysis of the impacts of the proposed measures and alternatives. Copies of Amendment 9, including the FSEIS, the Regulatory Impact Review (RIR), and the Initial Regulatory Flexibility Analysis (IRFA), are available from: Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904-6790. The FSEIS/RIR/IRFA is accessible via the Internet at <http://www.nero.nmfs.gov>.

**FOR FURTHER INFORMATION CONTACT:** Carrie Nordeen, Fishery Policy Analyst, 978-281-9272, fax 978-281-9135.

**SUPPLEMENTARY INFORMATION:**

### Background

This amendment is needed to remedy deficiencies in the FMP and to address other issues that have arisen since Amendment 8 to the FMP (64 FR 57587, October 26, 1999) became effective in 1999. Amendment 8 was only partially approved by NMFS because the amendment failed to adequately address some Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requirements for Federal FMPs. Specifically, the amendment was considered deficient with respect to: Consideration of fishing gear impacts on EFH as they relate to MSB fisheries; designation of EFH for *Loligo* eggs; and the reduction of bycatch and discarding of target and non-target species in the MSB fisheries.

The final version of Amendment 9 contains alternatives that consider allowing for multi-year specifications and management measures, extending or eliminating the moratorium on entry to the directed *Illex* fishery, revising the biological reference points for *Loligo*, designating EFH for *Loligo* eggs, implementing area closures to reduce gear impacts from MSB fisheries on EFH of other federally managed species, increasing the incidental possession limit for *Illex* vessels during a closure of the *Loligo* fishery, and requiring real-time electronic reporting via vessel monitoring systems in the *Illex* fishery. The Council held four public meetings on Amendment 9 during May 2007. Following the public comment period that ended on May 21, 2007, the Council adopted Amendment 9 on August 6, 2007. The Notice of Availability (NOA) for Amendment 9 was published on March 25, 2008 (73 FR 15716), with a comment period ending on May 27, 2008. A proposed rule for Amendment 9 was published on April 4, 2008 (73 FR 18483), with a comment period ending on May 19, 2008. On June 17, 2008, NMFS approved Amendment 9 on behalf of the Secretary of Commerce.

This rule establishes management measures that were recommended by the Council as part of Amendment 9. Specifically, this rule implements measures that: Allow for multi-year specifications for all four species managed under the FMP (mackerel, butterfish, *Illex*, and *Loligo*) for up to 3 years; extend the moratorium on entry into the *Illex* fishery, without a sunset provision; adopt biological reference points for *Loligo* recommended by the SARC; designate EFH for *Loligo* eggs based on best available science information; and prohibit bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons.

### Approved Measures

#### *Multi-Year Specifications and Management Measures*

Regulations at § 648.21 specify that specifications for mackerel, *Illex*, and butterfish are recommended to the Council on an annual basis, and that specifications for *Loligo* may be specified for up to 3 years, subject to annual review. To streamline the administrative and regulatory process involved in setting specifications and management measures, Amendment 9 establishes multi-year specifications for all four species: Mackerel, *Illex*, *Loligo*, and butterfish. Amendment 9 does not establish any specification measures; rather it affects the periodicity for specifying such regulatory measures

through future Council actions. Under multi-year specifications, Amendment 9 requires an annual review of updated information on the fishery by the MSB Monitoring Committee, as is the current practice, during the period of the multi-year specifications. The MSB Monitoring Committee will examine data collected from the fishery and resource surveys and alert the Council of any changes, including those of stock status, that might require a revision to the specifications before the multi-year period elapses.

This action allows for specifications and management measures for any or all of the four species in the FMP to be set for up to 3 years, subject to annual review. In the past, the specifications and management measures for MSB fisheries have remained fairly constant across years. This measure still enables the Council to respond to changes in stock status, in any given year, by modifying quotas or management measures. However, if changes were not necessary, the Council and NMFS would not have to recommend and implement annual specifications and management measures. Because this measure is largely administrative, it is not anticipated that there will be effects on the environment. This measure does have the potential to provide MSB fishery participants with an expanded planning horizon for harvesting and processing activities; therefore, it may have positive economic effects for MSB fishery participants.

#### *Moratorium on Entry into the Illex Fishery*

A fishery is considered overcapitalized when the harvest potential of the fishing fleet exceeds the harvest at optimum yield (OY). Information presented in Amendment 9 indicates the *Illex* fishery is overcapitalized; therefore, this amendment limits the potential for increases in the harvest capacity of the large-scale, directed *Illex* fishery.

In order to prevent excess harvest capacity from developing in the directed *Illex* fishery, a moratorium on new entry into this fishery was established in 1997. In the directed fishery, moratorium-permitted vessels are not subject to any daily *Illex* possession limit. As such, the maximum potential *Illex* landings for moratorium-permitted vessels are unlimited until 95 percent of the annual harvest quota has been achieved in any given year. Once 95 percent of the annual quota has been harvested, the possession limit for vessels with *Illex* moratorium permits becomes 10,000 lb (4.54 mt). The moratorium on new entry was initially

scheduled to expire in 2002, but has been extended several times through framework actions and is most recently scheduled to expire in July 2009.

Throughout the year, a small-scale, incidental catch fishery for *Illex* is currently provided for through an open-access Federal permit that allows possession of up to 10,000 lb (4.54 mt) of *Illex* on a single trip. In addition to the 10,000-lb (4.54-mt) trip allowance for *Illex*, vessels in possession of this permit are also allowed to land 2,500 lb (1.13 mt) of *Loligo* and 600 lb (0.27 mt) of butterfish in a single trip (unless the directed fishery closes prior to October 1, in which case the limit is 250 lb (0.11 mt)). Amendment 9 does not include any modifications to this permit.

Amendment 9 eliminates the scheduled expiration of the moratorium. As such, new entry into the directed commercial fishery for *Illex* is prohibited indefinitely. The transfer of moratorium permits from one participant to another will only be allowed through the transfer of ownership of a permitted vessel. Since the moratorium's implementation in 1997, there has been a slight decline in the number of vessels issued an *Illex* moratorium permit in any given year, from a maximum of 77 in 1998, to 72 in 2003. Amendment 9 prevents expansion of the size of the directed *Illex* fleet beyond the number of permitted vessels in 2008, thereby preventing expansion in a fishery that is already overcapitalized and offering the greatest degree of protection to historic participants in the directed *Illex* fishery.

This measure is anticipated to have economic benefits for historical participants already possessing *Illex* moratorium permits and the potential to negatively affect those wanting to become an *Illex* fishery participant in the future.

#### Biological Reference Points for *Loligo*

Regulations at § 600.315 state that conservation and management measures must be based upon the best scientific information available, and that FMPs should be amended on a timely basis, as new information indicates the necessity for change in objectives or management measures. Therefore, Amendment 9 revises the proxies for target and threshold fishing mortality rates,  $F_{\text{Target}}$  and  $F_{\text{Threshold}}$ , respectively, for *Loligo* to reflect the analytical advice provided by the most recent *Loligo* stock assessment review committee (SARC 34). While Amendment 9 revises the formulas and values for these reference points, the function of the reference points remains unchanged.  $F_{\text{Target}}$  is the basis for determining OY, and  $F_{\text{Threshold}}$  is used to

determine whether overfishing is occurring.

Because *Loligo* is a sub-annual species (i.e., has a lifespan of less than 1 year), the stock is solely dependent on sufficient recruitment year to year to prevent stock collapse. The status quo proxies for  $F_{\text{Target}}$  (75 percent of the fishing mortality rate supporting maximum sustainable yield ( $F_{\text{Max}}$ )) and  $F_{\text{Threshold}}$  ( $F_{\text{Max}}$ ) are based on maximum yield, while the revised proxies for  $F_{\text{Target}}$  and  $F_{\text{Threshold}}$  in Amendment 9 are more risk averse because they are based on average fishing mortality rates achieved during a time period when the stock biomass was fairly resilient (1987–2000). The revised proxies are calculated as follows:  $F_{\text{Target}}$  is the 75<sup>th</sup> percentile of fishing mortality rates during 1987–2000 and  $F_{\text{Threshold}}$  is the average fishing mortality rates during the same period. The revised proxy for  $F_{\text{Target}}$  (0.32 or 0.24 for trimesters and quarters, respectively) would be used as the basis for establishing *Loligo* OY. However, it should be noted that it is currently not possible to accurately predict *Loligo* stock biomass because recruitment, which occurs throughout the year, is highly variable inter-annually and is influenced by changing environmental conditions.

Biological reference points that ensure an adequate number of spawners produce adequate recruitment in the subsequent year are considered most appropriate for squid species. However, until such reference points can be reliably estimated for the *Loligo* stock, the revised reference points in Amendment 9 will serve as an intermediate step for calculating harvest levels that are more robust, with respect to stock sustainability, than status quo reference points.

#### Designation of EFH for *Loligo* Eggs

Amendment 9 designates EFH for *Loligo* eggs in order to bring the FMP into compliance with the Magnuson-Stevens Act requirement that FMPs describe and identify EFH for each life history stage of a managed species. The MSB FMP currently identifies and describes EFH for all life stages of MSB species for which information is available, with the exception of *Loligo* eggs. *Loligo* eggs are found attached to rocks and boulders on sand or mud bottom, as well as attached to aquatic vegetation in coastal and offshore bottom habitats from Georges Bank southward to Cape Hatteras. Generally, the following conditions exist where *Loligo* egg EFH is found: Bottom water temperatures between 10° C and 23° C; salinities of 30 to 32 ppt; and depths less than 50 m. Locations of fishery

interactions with *Loligo* eggs are reported in Hatfield and Cadrin (2002).<sup>1</sup>

This action adds a description of EFH and a map for *Loligo* eggs to the FMP that are based on the above information. Some Council members expressed concern that the proposed *Loligo* egg EFH areas are based on anecdotal information (i.e., interviews with fishermen). Also, they considered it likely that the proposed EFH areas are not constant, but instead shift from year to year. Nevertheless, the information on the locations of *Loligo* eggs provided in Hatfield and Cadrin (2002) is the best scientific information that is currently available. Additionally, EFH designations are meant to include habitat areas used in different years. Failure to designate EFH for *Loligo* eggs in Amendment 9 would be inconsistent with the EFH requirements of the Magnuson-Stevens Act.

To the degree that EFH is vulnerable to damage by fishing and/or non-fishing activities, management oversight of these activities in areas designated as EFH for a given life stage of any managed resource will allow for direct and indirect benefits for that resource. That oversight cannot occur, however, without first identifying the geographical locations of EFH. Amendment 9 identifies EFH for *Loligo* eggs based upon documented observations. By implementing Amendment 9, fishing and/or non-fishing activities that could potentially affect *Loligo* egg EFH would not be restricted. However, a requirement would be established whereby NMFS must be consulted to determine whether future Federal non-fishing activities would adversely impact *Loligo* egg EFH. Also, potential adverse impacts of MSB and other federally managed fisheries on *Loligo* egg EFH would have to be evaluated and, if necessary, minimized, in a future management action.

#### Prohibition on Bottom Trawling to Reduce Gear Impacts on EFH by MSB Fisheries

Amendment 9 considered reducing gear impacts on EFH by MSB fisheries in order to bring the FMP into compliance with the Magnuson-Stevens Act requirements. The FMP currently lacks adequate analysis of the effects of MSB fisheries on EFH for federally managed species within the geographic scope of the MSB fisheries. Such an analysis has been conducted as part of Amendment 9, and the results indicate

<sup>1</sup> Hatfield, E.M.C. and S.X. Cadrin. 2002. Geographic and temporal patterns in size and maturity of the longfin inshore squid (*Loligo pealeii*) off the northeastern United States. Fish. Bull. 100 (2): 200–213.

that actions should be taken that would reduce impacts to EFH for federally managed species related to the activities of the MSB fisheries by prohibiting bottom trawling by MSB-permitted vessels.

This action prohibits bottom trawling in Lydonia and Oceanographer Canyons by MSB-permitted vessels. MSB-permitted vessels transiting these canyons must stow all bottom trawl gear. While Lydonia and Oceanographer Canyons are only minimally used by vessels with bottom trawl gear, this action will prevent future expansion of MSB fisheries into these canyons. This prohibition was determined to be practicable by the Council and is similar to regulations associated with the Northeast Region's Monkfish FMP (i.e., vessels on a monkfish day-at-sea are prohibited from entering these canyons). Even though this action does not prohibit bottom trawling by other federally permitted vessels in Lydonia and Oceanographer Canyons, this prohibition would improve habitat quality in these canyons by reducing the adverse effects of bottom trawling on EFH for federally managed species. Decreased fishery interactions with the managed stocks, non-target species, and protected and endangered species in Lydonia and Oceanographer Canyons are also expected, and this would correspond to localized benefits to these resources. The areas affected by the action represent 3 percent of the total EFH for juvenile tilefish and 2 percent or less for several other species (barndoor skate, little skate, red hake, silver hake, and witch flounder).

Short-term costs to fishery participants are related to the size of the area where bottom trawling is prohibited and how frequently those areas are utilized by fishery participants (see FRFA for complete economic analysis). The prohibition of bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons is likely to have a minimal impact on revenues both for vessel owners and ports. Other restricted area alternatives considered by the Council would have provided greater habitat protection, but were not practicable because their potential economic impact would be higher.

### Comments and Responses

NMFS received four comment letters on the proposed rule for Amendment 9; letters were from one industry representative and three individuals.

*Comment 1:* The industry representative and one individual support the measure to extend the moratorium on entry into the *Illex*

fishery, without a sunset provision. Commenters explain that this measure benefits current participants in the *Illex* fishery by protecting their investment and preventing overcapitalization. Additionally, the industry representative believes further reduction of capacity in the *Illex* fishery is not necessary because few incentives exist for new participants to enter the *Illex* fishery (i.e., it is a high volume/low value fishery and it is cost prohibitive to install a refrigerated seawater holding system necessary for *Illex*), and the number of trips targeting *Illex* have declined each year since 1998.

*Response:* Amendment 9 prevents expansion of the size of the directed *Illex* fleet beyond the number of permitted vessels in 2008, thereby preventing expansion in a fishery that is already overcapitalized and offering the greatest degree of protection to historic participants in the directed *Illex* fishery. However, Amendment 9 does not preclude a future action to reduce the overcapacity that already exists in the *Illex* fishery.

*Comment 2:* One individual expressed support for a complete ban on all trawling that is harmful for the next 70 years.

*Response:* While Amendment 9 does not consider a ban on trawling, this comment indicates general support for the measure to prohibit bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons.

*Comment 3:* The industry representative supports the measure to allow for multi-year specifications for all four species (mackerel, butterfish, *Illex*, and *Loligo*) for up to 3 years, subject to annual review, provided the Council has flexibility to adjust measures through the specification process in response to new information.

*Response:* NMFS concurs with the commenter.

*Comment 4:* The industry representative does not support revising the biological reference points (i.e.,  $F_{\text{Target}}$  and  $F_{\text{Threshold}}$ ) recommended by the SARC for *Loligo* because they argue that the status quo reference points are adequate to meet the overfishing requirements. The industry representative also believes that *Loligo* biomass trends have been relatively stable over the past several decades, that changes in indices were mainly due to environmental factors, and that stability of indices are due to the flexibility of life history patterns of *Loligo*. Additionally, the industry representative and one individual believe that language in the proposed rule stating that status quo biological reference points for *Loligo* "may be too

liberal and subject the stock to overfishing" is unsupported by the Amendment 9 FSEIS or the report from the most recent *Loligo* squid stock assessment report. The comment letter from the individual further explains that the status quo reference points were rejected by the SARC because they were too analytically complex in light of the dynamic nature of the *Loligo* stock; therefore, the SARC recommended a simpler approach for calculating *Loligo* biological reference points.

*Response:* Biological reference points for squid species, such as *Loligo*, need to account for their unique life history in order to ensure stock sustainability. *Loligo* is a sub-annual species and recruits in any given year are produced by the survivors from the previous year. However, annual population abundance levels are highly variable and recruitment levels are currently not predictable. A single recruitment failure could lead to stock collapse. In order to minimize the risk of recruitment overfishing, squid stocks are ideally managed by ensuring that a minimum percentage of the spawners escape each year. The status quo overfishing definition for *Loligo* does not minimize this risk because it maximizes yield, rather than adequate spawner escapement. For these reasons, NMFS disagrees with the conclusion that, because *Loligo* biomass trends have been relatively stable over the past several decades, the status quo reference points *Loligo* are adequate to meet the overfishing requirements.

NMFS agrees with the commenters that the language in the proposed rule stating that status quo biological reference points for *Loligo* "may be too liberal and subject the stock to overfishing" may be too general and takes this opportunity to clarify the difference between the status quo biological reference points and the revised reference points in Amendment 9. The status quo reference points maximize yield, while the reference points in Amendment 9 are more risk averse because they are based on estimated fishing mortality rates during a time period (1987–2000) when stock biomass levels appeared to be fairly resilient to the levels of landings that occurred during that same period. In addition, NMFS agrees with the commenter that the status quo reference points were too analytically complex, in light of the dynamic nature of the *Loligo* stock, and that reference points in Amendment 9 are less complex and, therefore, more appropriate for the *Loligo* stock.

*Comment 5:* The industry representative does not support the

measure to designate EFH for *Loligo* eggs and asserts that *Loligo* egg EFH is based on anecdotal information and areas where eggs have been observed are likely to vary year to year. The comment letter explains that *Loligo* are a short-lived, highly productive animal whose abundance is more vulnerable to environmental conditions such as temperature, depth, and salinity. The letter notes that areas with observation of *Loligo* eggs are productive, historical fishing areas and there is no evidence that the bycatch of *Loligo* eggs reduces productivity or negatively impacts *Loligo* recruitment. Additionally, the commenter believes the proposed rule inappropriately speculates that a future action would evaluate fishing activities to determine if fishing activities adversely impact *Loligo* eggs in an attempt to impose prohibitions on mobile bottom-tending gear.

**Response:** As described previously, Amendment 9 brings the FMP into compliance with the Magnuson-Stevens Act requirement that FMPs describe and identify EFH for each life history stage of a managed species. The MSB FMP currently identifies and describes EFH for all life stages of MSB species for which information is available, with the exception of *Loligo* eggs. Failure to designate EFH for *Loligo* eggs in Amendment 9 would be inconsistent with the EFH requirements of the Magnuson-Stevens Act. During the development of and public comment periods on Amendment 9, individuals expressed concern that the proposed *Loligo* egg EFH areas are based on anecdotal information (i.e., interviews with fishermen) and that the proposed EFH areas are not constant, but instead shift from year to year. Nevertheless, information on the location of *Loligo* eggs is based on information in a peer-reviewed, scientific journal and is, therefore, based on the best scientific information available. Additionally, EFH designations are designed to consider year-to-year variability in habitat requirements and implementation of Amendment 9 does not preclude revising descriptions of EFH for *Loligo* eggs as new information becomes available. In addition to requiring that EFH be designated for each life history stage of a managed species, the Magnuson-Stevens Act also requires that potential adverse impacts of MSB fisheries on *Loligo* egg EFH be evaluated. Explaining this requirement in the proposed rule was appropriate. Based upon the outcome of that evaluation, a range of habitat protection measures exist that could be implemented if protection of *Loligo* egg

EFH is determined to be necessary. Prohibitions on mobile bottom-tending gear is not the only option for mitigating potential effects of MSB fisheries on *Loligo* egg EFH.

**Comment 6:** The industry representative does not support the measure to prohibit bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons. Opposition to prohibiting bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons is based on the industry representatives belief that Amendment 9 offers no rationale on why prohibiting trawling in those areas will have an effect on MSB species and how bottom trawling for MSB species affects habitat in those areas. Further, the industry representative claims that this measure is being used to protect deep-sea corals, despite no evidence in Amendment 9 supporting that fishing for MSB species results in coral bycatch, and that, because Amendment 9 does not demonstrate that MSB fishing in these areas results in coral bycatch that NMFS and the Council have approved an alternative that is in opposition to NOAA's General Counsel and illegal.

**Response:** As described previously, Amendment 9 considered reducing gear impacts on EFH by MSB fisheries in order to bring the FMP into compliance with the Magnuson-Stevens Act requirements. The FMP currently lacks adequate analysis of the effects of MSB fisheries on EFH for federally managed species within the geographic scope of the MSB fisheries. Such an analysis has been conducted as part of Amendment 9, and the results indicate that actions should be taken that would reduce impacts to EFH for federally managed species related to the activities of the MSB fisheries by prohibiting bottom trawling by MSB-permitted vessels.

The prohibition of bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons is not intended to protect deep-sea coral. Neither the proposed rule or FSEIS for Amendment 9 suggests that this prohibition is because deep-sea coral is bycatch in the MSB fisheries. The proposed rule explained that the proposed prohibition was similar to regulations associated with the Northeast Region's Monkfish FMP because both regulations are based on protecting EFH for fish species (e.g., tilefish) and preventing fishery expansion into offshore canyons that contain habitat vulnerable to bottom trawling. Because neither prohibition (i.e., vessels fishing under a monkfish day-at-sea are prohibited from fishing in Lydonia and Oceanographer Canyons; MSB-permitted vessels are prohibited from bottom trawling in Lydonia and

Oceanographer Canyons) is based on protecting coral, neither prohibition is inconsistent with advice from NOAA's Office of General Counsel.

#### Changes From the Proposed Rule

There are no changes from the proposed rule.

#### Classification

The Administrator, Northeast Region, NMFS, determined that Amendment 9 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan is necessary for the conservation and management of the Atlantic mackerel, squid, and butterfish fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable law.

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

The Council prepared an FSEIS for Amendment 9; a notice of availability was published on March 28, 2008 (73 FR 16672). The FSEIS describes the impacts of the Amendment 9 measures on the environment. The measures to allow for multi-year specifications and revised biological reference points for *Loligo* are largely administrative. However, they will provide for an expanded planning horizon for harvesting and processing activities and a fixed constant as a basis for the fishing target definition, respectively. The measure to designate EFH for *Loligo* eggs will not directly affect the environment, but it will allow future impacts to EFH for *Loligo* eggs to be identified and mitigated. Extending the moratorium on entry into the *Illex* fishery without a sunset provision and prohibiting bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons will have short-term, negative economic impacts, but are expected to have long-term benefits on the biological and physical environment.

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), has prepared a FRFA in support of Amendment 9. The FRFA describes the economic impact that this final rule, along with other non-preferred alternatives, will have on small entities.

The FRFA incorporates the economic impacts and analysis summarized in the IRFA for the proposed rule to implement Amendment 9, the comments and responses in this final rule, and the corresponding economic analyses prepared for Amendment 9 (e.g., the FSEIS and the RIR). The contents of these incorporated documents are not repeated in detail here. A copy of the IRFA, the RIR, and the FSEIS are available upon request

(see ADDRESSES). A description of the reasons for this action, the objectives of the action, and the legal basis for this final rule are found in Amendment 9 and the preamble to the proposed and final rules.

#### *Statement of Need*

The purpose of this action is to remedy deficiencies in the FMP and to address other issues that have arisen since Amendment 8 to the FMP became effective in 1999.

#### *A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments*

As described previously, several of the measures in Amendment 9 are not anticipated to have direct economic effects on MSB fisheries; however, extending the moratorium on entry into the *Illex* fishery, without a sunset provision, and prohibiting bottom trawling in Lydonia and Oceanographer Canyons by MSB-permitted vessels may have economic effects on MSB fisheries. All public comments on issues relative to the IRFA, in which commenters expressed concern directly and indirectly about the economic impacts of the measures in Amendment 9, are described in the "Comments and Responses" section of the preamble of this rule. NMFS's assessment of the issues raised in comments and responses is also provided in the "Comments and Responses" section of the preamble of this final rule and, therefore, are not repeated here. After taking all public comments into consideration, NMFS approved Amendment 9 on June 17, 2008.

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

There are no large entities participating in this fishery, as none grossed more than 4 million dollars annually; therefore, there are no disproportionate economic impacts on small entities. The measures in Amendment 9 affect all MSB-permitted vessels; however, many of the proposed measures (e.g., multi-year specifications, revised biological reference points for *Loligo*, designation of EFH for *Loligo* eggs) are not expected to have direct economic impacts. Section 6.5 (Human Communities) in the Amendment 9 FSEIS describes the number of vessels and revenue information for each of the MSB fisheries; therefore, that information is not repeated here.

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

This action does not contain any new collection-of-information, reporting, recordkeeping, or other compliance requirements. It does not duplicate, overlap, or conflict with any other Federal rules.

#### *Description of the Steps the Agency has Taken to Minimize the Significant Economic Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities was Rejected*

As described previously, several of the approved measures in Amendment 9 are not anticipated to have direct economic effects on MSB fisheries. Implementing multi-year specifications and management measures for all four managed species has the potential to provide MSB fishery participants with an expanded planning horizon for harvesting and processing activities. Therefore, it may have positive economic effects for MSB fishery participants when compared to the non-selected alternative of no action (annual specifications and management measures for mackerel, *Illex*, and butterfish; multi-year specifications and management measures for *Loligo*). This could lead to better business plans and ultimately greater economic benefits. Amendment 9 contains two alternatives that would have provided for multi-year specifications and management measures; the selected alternative allows for multi-year specifications for up to 3 years, subject to annual review, and a non-selected alternative would have provided for multi-year specifications for up to 5 years, subject to annual review. The 3-year alternative was selected because management based on 3-year stock projections, rather than 5-year stock projections, is likely more appropriate for MSB species, given their relatively brief life spans, but it is difficult to assign a dollar value to this effect.

The revisions to biological reference points ( $F_{\text{Target}}$  and  $F_{\text{Threshold}}$ ) for *Loligo* are primarily administrative and are not expected to have direct economic effects on fishery participants. Revising the reference points is consistent with Magnuson-Stevens Act requirements to use the best scientific information

available, as compared to the non-selective alternative of no action (using status quo reference points for  $F_{\text{Target}}$  and  $F_{\text{Threshold}}$ ), but the economic impacts of the proposed action are difficult to predict. The revised reference points are not expected to result in substantial changes to the *Loligo* quota; the annual quota has been set at 17,000 mt each year since 2001. Consumer demand for *Loligo* will affect *Loligo* prices, which, in turn, will result in economic impacts on *Loligo* harvesters that are currently unquantifiable. If, on the other hand, the *Loligo* stock size decreases such that harvest costs increase, then *Loligo* prices would be expected to increase. Because the revised biological reference points are considered more robust, with respect to stock sustainability, than the status quo reference points, it is expected that there would be some long-term economic benefits associated with the revised reference points as compared to benefits associated with the status quo reference points.

The measure designating EFH for *Loligo* eggs is not anticipated to have any direct economic effects on MSB participants, when compared to the non-selected alternative of not designating EFH for *Loligo* eggs. Designating EFH for *Loligo* eggs does not result in an immediate action that would restrict the actions of any regulated entity.

Additionally, the measure extending the moratorium on entry into the *Illex* fishery, without a sunset provision, is not expected to have any direct economic effects on MSB participants, when compared to the non-selected alternatives (i.e., terminating the moratorium, allowing the moratorium to expire in 2009, extending the moratorium without a sunset provision, but allowing new entry through permit transfer), because the moratorium on entry into the directed *Illex* fishery has been in place since 1997. Failure to extend the moratorium could result in further overcapitalization of this sector of the fishing industry, which in turn could have negative economic consequences for the vessels that depend upon the *Illex* resource.

The measure in Amendment 9 that may have economic effects on MSB fisheries is the prohibition on bottom trawling in Lydonia and Oceanographer Canyons by MSB-permitted vessels. The selected alternative and non-selected alternatives prohibiting bottom trawling (either at the head of Hudson Canyon or in the tilefish habitat area of particular concern (HAPC)) would improve habitat quality in the closed areas by reducing the adverse impacts of bottom trawling by MSB-permitted vessels as compared

to the no action, non-selected alternative (no new areas closed to bottom trawling by MSB-permitted vessels). Decreased fishery interactions with the managed stocks, non-target species, and protected and endangered species are also expected to be associated with action alternatives, and this would correspond to localized benefits to these resources.

Short-term costs to fishery participants are related to the size of the closure area. Analyses of ex-vessel revenues from MSB-permitted bottom trawl vessels were conducted for 2001–2004. The results indicated that closing tilefish HAPC (non-selected alternative) to bottom otter trawling during that period would have reduced annual revenue from bottom trawling by 10 percent or more for about 162 MSB-permitted vessels. Closing the head of Hudson Canyon (non-selected alternative) to bottom trawling in 2001–2004 would have reduced ex-vessel revenues by 10 percent or more for about 64 MSB-permitted bottom trawl vessels. Geographical analysis of fishing effort reveals minimal use of bottom trawl gear in Lydonia and Oceanographer Canyons; therefore, of the significant alternatives considered, the closure of Lydonia and Oceanographer Canyons (selected alternative) would have minimis potential economic impacts on revenue for vessel owners.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: June 26 2008.

John Oliver,

Deputy Assistant Administrator for Operations, 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 § 648.4, paragraph (a)(5)(i) is revised to read as follows:

§ 648.4 Vessel permits.

\* \* \* \* \*

- (a) \* \* \*
(5) \* \* \*
(i) Loligo squid/butterfish and Illex squid moratorium permits.
\* \* \* \* \*

3. In § 648.14, paragraph (p)(12) is added to read as follows:

§ 648.14 Prohibitions.

\* \* \* \* \*

- (p) \* \* \*
(12) Enter or be in the areas described at § 648.23(a)(4).
\* \* \* \* \*

4. In § 648.20, paragraph (b) is revised to read as follows:

§ 648.20 Maximum optimum yield (OYs).

\* \* \* \* \*

- (b) Loligo—the catch associated with a fishing mortality rate of F\_Threshold.
\* \* \* \* \*

5. In § 648.21, paragraphs (a)(1) through (4) are revised to read as follows:

§ 648.21 Procedures for determining initial annual amounts.

\* \* \* \* \*

- (a) \* \* \*
(1) Initial OY (IOY), including research quota (RQ), domestic annual harvest (DAH), and domestic annual processing (DAP) for Illex squid, which, subject to annual review, may be specified for a period of up to 3 years;
(2) IOY, including RQ, DAH, DAP, and bycatch level of the total allowable level of foreign fishing (TALFF), if any, for butterfish, which, subject to annual review, may be specified for a period of up to 3 years;
(3) IOY, including RQ, DAH, DAP, joint venture processing (JVP), if any, and TALFF, if any, for mackerel, which, subject to annual review, may be specified for a period of up to 3 years. The Monitoring Committee may also recommend that certain ratios of TALFF, if any, for mackerel to purchases of domestic harvested fish and/or domestic processed fish be established in relation to the initial annual amounts.
(4) Initial OY (IOY), including research quota (RQ), domestic annual harvest (DAH), and domestic annual processing (DAP) for Loligo squid, which, subject to annual review, may be specified for a period of up to 3 years; and
\* \* \* \* \*

6. In § 648.23, paragraph (a)(4) is added to read as follows:

§ 648.23 Gear restrictions.

(a) \* \* \*

(4) Mackerel, squid, and butterfish bottom trawling restricted areas. (i) Oceanographer Canyon. No permitted mackerel, squid, or butterfish vessel may fish with bottom trawl gear in the Oceanographer Canyon or be in the Oceanographer Canyon unless transiting. Vessels may transit this area provided the bottom trawl gear is stowed in accordance with the provisions of paragraph (b) of this section. Oceanographer Canyon is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request):

OCEANOGRAPHER CANYON

Table with 3 columns: Point, N. Lat., W. Long. Rows include OC1, OC2, OC3, OC4, OC1 with coordinates.

(ii) Lydonia Canyon. No permitted mackerel, squid, or butterfish vessel may fish with bottom trawl gear in the Lydonia Canyon or be in the Lydonia Canyon unless transiting. Vessels may transit this area provided the bottom trawl gear is stowed in accordance with the provisions of paragraph (b) of this section. Lydonia Canyon is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request):

LYDONIA CANYON

Table with 3 columns: Point, N. Lat., W. Long. Rows include LC1, LC2, LC3, LC4, LC5, LC1 with coordinates.

\* \* \* \* \*