

(2) Non-State government operated facilities (that is, all governmentally operated facilities that are not operated by the State) as defined at § 433.50(a) of this chapter.

(3) Privately operated facilities that is, all facilities that are not operated by a unit of government as defined at § 433.50(a) of this chapter.

(b) *General rules.* (1) For privately operated facilities, upper Payment Limit (UPL) refers to a reasonable estimate of the amount that would be paid for the services furnished by the group of facilities under Medicare payment principles in subchapter B of this chapter.

(i) *Private Outpatient Hospital Services.* Services included in the calculation of the private outpatient hospital UPL must meet all of the criteria for outpatient hospital services defined in § 440.20 of this chapter. A reasonable estimate of the amount that would be paid for outpatient hospital services under Medicare payment principles is determined through—

(A) Calculation of estimated Medicare payment for Medicaid equivalent outpatient services reimbursed under current Medicare payment systems, including—

(1) Outpatient hospital services paid under the Medicare outpatient prospective payment system as defined under § 419.2 of this chapter; and

(2) Outpatient hospital services or clinic services paid under a Medicare outpatient hospital or clinic fee schedule or alternate payment methodology.

(B) The estimated Medicare payment may be based on the Medicare cost report, or an accepted State cost report that reports the same data from the Medicare cost report references in paragraphs (b)(1)(i)(B)(1) through (b)(1)(i)(B)(2) of this section, as the source to determine either:

(1) The ratio of costs-to-charges for all services included in the outpatient hospital UPL calculation. The Medicare cost-to-charges ratios for outpatient hospital services are found on Worksheet C and Worksheet D, Part V of the Medicare cost report; or

(2) The ratio of payments-to-charges for all services included in the outpatient hospital UPL calculation. Medicare outpatient payments are found on Worksheet E, Part B and outpatient charges are found on Worksheet D, Part V of the Medicare cost report.

(3) The charge ratios in paragraphs (b)(1)(i)(B)(1) through (b)(1)(i)(B)(2) of this section for Medicare equivalent services are multiplied by Medicaid charges as reported to the Medicaid

Management Information System (MMIS).

(ii) *Private Clinic Services.* For privately operated clinics that are not providing outpatient hospital services under § 440.20 (those that would not be paid by Medicare in that setting under OPPTS or under an alternative outpatient hospital service payment methodology), the reasonable estimate of what Medicare would pay for equivalent Medicaid services may be determined through:

(A) A State Plan reimbursement methodology for covered services that is a defined percentage, not to exceed 100 percent, of what Medicare pays under the non-facility fee schedule; or

(B) For reimbursement methodologies based upon a Medicaid-specific fee schedule or encounter rate, a comparison by CPT code of the amount paid by Medicare for equivalent Medicaid services. The calculation may be conducted in the aggregate for clinic type or by specific facilities (ESRD, ASC, etc). Clinical diagnostic laboratory services or any other services for which the Act defines a separate upper limit for Medicaid reimbursement must be excluded from the clinic UPL.

(C) For dentists providing services in clinics, the clinic UPL calculation may include payment amounts at the amount that Medicaid would pay outside of the facility.

\* \* \* \* \*

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: March 15, 2007.

**Leslie V. Norwalk,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: June 20, 2007.

**Michael O. Leavitt,**

*Secretary.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 070827484-7485-01]

RIN 0648-AV99

### Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder Fishery; Fishing Year 2008

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

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

**SUMMARY:** NMFS proposes coastwide summer flounder recreational management measures to administratively complete the rulemaking process initiated in March 2007. This action is necessary to propose appropriate coastwide management measures to be in place on January 1, 2008, following the expiration of the current state-by-state conservation equivalency management measures on December 31, 2007. The intent of these measures is to prevent overfishing of the summer flounder resource during the interim between the aforementioned expiration of the 2007 recreational measures and the implementation of measures for 2008.

**DATES:** Comments must be received by 5 p.m. local time, on October 15, 2007.

**ADDRESSES:** You may submit comments by any of the following methods:

- E-mail: [0648-AV99@noaa.gov](mailto:0648-AV99@noaa.gov).

Include in the subject line the following identifier: "Comments on 2008 Summer Flounder Interim Recreational Measures."

- Federal e-rulemaking portal: <http://www.regulations.gov>

- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on 2008 Summer Flounder Interim Recreational Measures."

- Fax: (978) 281-9135.

Copies of the Supplemental Environmental Assessment, as well as the original Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) completed for the 2007 recreational management measures are available from Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room

2115, Federal Building, 300 South New Street, Dover, DE 19901-6790. The Supplemental Environmental Assessment is also accessible via the Internet at <http://www.nero.noaa.gov>.

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

**SUPPLEMENTARY INFORMATION:** This proposed action is necessary to complete the final detail of the 2007 summer flounder recreational management measures rulemaking and should not be confused with upcoming process to develop the 2008 recreational management measures. The Mid-Atlantic Fishery Management Council (Council) will begin development of the 2008 recreational management measures, based on updated assessment information and 2007 fishery information, through its Monitoring Committee meeting in November 2007. The Council will consider the Monitoring Committee's recommendations for 2008 management measures during its December 2007 meeting in Secaucus, NJ. The following summarizes the details of several events that transpired before and during the initial recreational management measures rulemaking that brought about the need for this action.

### **2007 Recreational Management Measures Options**

Under the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP), the Council may recommend and NMFS may approve one of two approaches for managing the summer flounder recreational fishery: State-by-state conservation equivalency with a precautionary default backstop approved by the Atlantic States Marine Fisheries Commission (Commission), which cooperatively manages summer flounder in state waters, and NMFS; or coastwide management measures. The FMP requires that the Council review updated assessment and fishery information on an annual basis and recommend to NMFS both a Total Allowable Landings (TAL) and recreational management measures. Under conservation equivalency, any state that fails to provide measures for Commission and NMFS review, or whose measures are found not to be sufficient to achieve the required reduction in recreational landings, is bound to the precautionary default measures. The precautionary default is set at or below the level of reduction needed for the state with the highest reduction level. Coastwide measures are designed to achieve the necessary

reduction in landings for the entire coast.

### **Council's Proposed 2007 Measures**

The Council indicated, during its December 2006 meeting, that its preferred alternative for 2007 summer flounder recreational fishery management was conservation equivalency. Under this approach, states craft measures that produce the required state-by-state reduction in recreational landings to constrain landings within their respective targets. NMFS implemented conservation equivalency to manage the 2007 recreational summer flounder fishery, consistent with the Council's recommendation, on June 1, 2007 (72 FR 30492). The precautionary default measures were not required for any state, as both the Commission and NMFS approved and implemented the individual states' measures for equivalent reductions. Detailed information on the 2007 conservation equivalent and precautionary default measures are found in the June 1, 2007, final rule and is not repeated here.

The Council proposed, as the non-preferred alternative for the 2007 summer flounder recreational fishery management, coastwide measures of a 19-inch (48.26-cm) minimum fish size, a 1-fish possession limit, and a year-round season. In a year when conservation equivalency is implemented, the coastwide measures are not in effect during the fishing year but become the regulatory default measures in place on January 1 in the year after conservation equivalency has expired. These measures remain effective until superseded by new measures, implemented by NMFS as part of the annual management measures review conducted by the Council, as required by the FMP.

### **Events that Transpired Before and During Rulemaking Requiring Change to Proposed Coastwide Measures**

The 2007 summer flounder TAL was increased by NMFS from 12.983 million lb (5,889 mt), as published in the **Federal Register** on December 14, 2006 (71 FR 75134), to 17.112 million lb (7,762 mt) on January 19, 2007 (72 FR 2458). The increase in TAL was the result of the Secretary of Commerce's determination that the rebuilding time line for summer flounder could be extended for 3 years, consistent with authority granted in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (Reauthorized Magnuson-Stevens Act). The rationale for the respective TALs, including the justifications for increasing the summer flounder

rebuilding time line and increasing the 2007 TAL, are included within the individual rules and are not repeated here.

The development of the 2007 summer flounder recreational management measures occurred concurrently with the passage of the Reauthorized Magnuson-Stevens Act by Congress, analysis of recreational management measures alternatives by Council and NMFS staff, the December 2006 Council meeting, and the aforementioned increase in TAL following the Secretarial determination to extend the summer flounder rebuilding time line. Because of this succession of overlapping events from December 2006 through January 2007, during the development of recreational management measures, insufficient time was available for the development of coastwide management alternatives based on the higher TAL and subsequently higher recreational harvest limit before NMFS published the proposed 2007 recreational management measures (72 FR 12158, March 15, 2007).

Individual states do not begin to develop conservation equivalency measures until after the Council and Commission's Summer Flounder Management Board (Board) have identified conservation equivalency as the preferred management system for the upcoming year. The Council and the Board identified conservation equivalency as their preferred alternative for 2007 management during the December 2006 Council meeting. NMFS's emergency action to increase the 2007 TAL occurred in mid-January 2007. As a result, states were able to craft their 2007 conservation equivalency proposals consistent with the level of reduction necessary to constrain recreational landings to the targets resulting from the increased 17.112-million-lb (7,762-mt) TAL. However, the analysis had already been conducted for the coastwide measures alternative based on the recreational harvest limit associated with the lower 12.983-million-lb (5,889-mt) TAL and was not revised prior to the publication of the recreational management measures proposed rule (72 FR 12158, March 15, 2007). In response to the proposed rule, members of the public commented that the proposed coastwide measures of a 19-inch (48.26-cm) minimum fish size, 1-fish possession limit, and year-round season would be unduly restrictive if implemented, as it would constrain landings to approximately 55 percent of the recreational harvest limit under the

increased 17.112-million-lb (7,762-mt) TAL.

This issue was rendered moot for 2007 as conservation equivalency was implemented by NMFS instead of the coastwide measures (72 FR 30492, June 1, 2007). However, on January 1, 2008, after conservation equivalency has expired for the 2007 fishing year, the coastwide measures will become the interim default measures and remain in place until new recreational management measures are developed and implemented as part of the annual recreational management measures review in late spring/early summer 2008. NMFS indicated in the 2007 recreational management measures final rule (72 FR 30492, June 1, 2007) that a separate notice and comment rulemaking, to propose and implement an coastwide measure that is based on the increased TAL to serve as the interim 2008 management measures after conservation equivalency has expired, would be undertaken. This proposed rule is the initiation of that action, which is largely administrative and designed to complete the normal recreational management measures rulemaking process that had been constrained by the options available for consideration during the initial rulemaking that resulted in conservation equivalency for 2007.

#### Proposed Interim Coastwide Measure

The Commission's Technical Committee (TC) conducted analysis on coastwide measure alternatives after the implementation of the increased TAL. Several options considered by the TC were designed to constrain landings to or below the increased 2007 recreational harvest limit of 2,421,460 fish. The TC provided analysis that indicated an 18.5-inch (46.99-cm) minimum fish size with a 4-fish possession limit and a year-round season would constrain landings to 90 percent of the harvest limit (2,181,735 fish). NMFS proposes to now implement these measures as the 2007 coastwide measures. As a result, these measures, if adopted, would complete the normal regulatory process that occurs when conservation equivalency is utilized to manage the summer flounder recreational fishery, as was the case for 2007. These measures, if adopted, will replace the existing coastwide measures regulatory language of a 17-inch (43.18-cm) minimum fish size, a 4-fish possession limit, and no closed season, and serve as the default management measures in place on January 1, 2008, after conservation equivalent measures have expired.

The 2008 TAL and the resulting recreational harvest limit will not be

finalized and the Council will not recommend recreational harvest measures until December 2007. It is not certain, at this time, if the coastwide measure will require revision as part of the updated 2008 recreational management measures, as the annual development of those measures will not begin until later this year.

These measures, if implemented, should be sufficiently risk averse as interim measures until new measures, based on the updated 2007 stock assessment, are developed and implemented. Summer flounder are typically found offshore during colder winter months and only limited recreational fisheries occur in the southern range of the stock during spring. Marine Recreational Fisheries Statistical Survey (MRFSS) data from 1994–1998 show that less than 0.9-percent of the annual harvest occurs in the first two MRFSS data collection periods (called waves) of the year (January–April). Approximately 28 percent of the coastwide summer flounder harvest occurs in Wave 3 (May–June). The difference in implementation time between conservation equivalency and coastwide measures is the time it takes states to develop, and get approved, individual measures under conservation equivalency, should that management method be utilized in 2008.

Based on recent years' development and rulemaking schedule when conservation equivalency has been utilized for summer flounder recreational management measures, it is expected that updated measures, based on 2007 recreational landings and adjusted for any quota overages, would be in place before Wave 4 (July–August) and the bulk of summer flounder recreational fisheries begin in 2008. If different coastwide measures are recommended by the Council and Commission and implemented by NMFS for 2008 management, it is expected that those measures would be in place during Wave 2 (March–April 2008).

#### Classification

NMFS has determined that the proposed rule is consistent with the FMP and preliminarily determined that the rule is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

An IRFA was prepared for the 2007 recreational management measures rulemaking process, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered (i.e., what problem it addresses), and the legal basis for this action are contained in the initial recreational management measures proposed rule (72 FR 12158, March 15, 2007) and at the beginning of that rule's preamble and in the **SUMMARY** section of this proposed rule's preamble. A detailed summary of the analysis conducted is included in the initial recreational management measures proposed rule (72 FR 12158, March 15, 2007). An additional summary follows. A copy of the complete IRFA is available from the Council (see **ADDRESSES**).

The proposed action could affect any recreational angler who fishes for summer flounder, in the EEZ or on a party/charter vessel issued a Federal permit for summer flounder. However, the IRFA focuses upon the impacts on party/charter vessels issued a Federal permit for summer flounder because these vessels are considered small business entities for the purposes of the Regulatory Flexibility Act, i.e., businesses with gross revenues of up to \$6.5 million. These small entities can be specifically identified in the Federal vessel permit database and would be impacted by the recreational measures, regardless of whether they fish in Federal or state waters. Although individual recreational anglers are likely to be impacted, they are not considered small entities under the RFA. Also, there is no permit requirement to participate in these fisheries; thus, it would be difficult to quantify any impacts on recreational anglers in general.

The proposed measures could affect any of the 1,006 vessels possessing a Federal charter/party permit for summer flounder in 2005, the most recent year for which complete permit data are available. However, only 66 of these vessels reported active participation in the recreational summer flounder fishery in 2005.

In the IRFA, the no-action alternative (i.e., Alternative 1, maintenance of the regulations as codified) is defined as continuation of the following measures for summer flounder: Coastwide measures of a 17-inch (43.18-cm) minimum fish size; a 4-fish possession limit; and no closed season (i.e., season of January 1 through December 31). In consideration of the recreational harvest limits established for the 2007 fishing

year and necessary for the beginning of the 2008 fishing year, taking no action in the summer flounder fishery would be inconsistent with the goals and objectives of the FMP and its implementing regulations because the no-action alternative would not have been expected to prevent the 2007 summer flounder recreational harvest limits from being exceeded. In addition, it is unlikely that these measures would serve as adequate interim regulatory measures for 2008 until appropriate measures, either conservation equivalency or different coastwide measures, are implemented to constrain harvest within the yet to be established 2008 recreational harvest limit.

The impacts of the Council's originally proposed summer flounder coastwide alternative (i.e., Alternative 2) for a 19-inch (48.26-cm) minimum fish size, a 1-fish possession limit, and no closed season, were evaluated using the quantitative methods of the IRFA as summarized in the initial proposed rule (72 FR 12158, March 15, 2007). Impacted trips were defined under Alternative 2 as individual angler trips taken aboard party/charter vessels in 2006 that landed at least one summer flounder smaller than 19 inches (48.26 cm), or that landed more than one summer flounder. The analysis concluded that the measures would affect 4.13 percent of the party/charter vessel trips in the NE, including those trips where no summer flounder were caught.

However, the Alternative 2 measures were designed to constrain recreational landings to the original recreational harvest limit resulting from the pre-extended rebuilding time frame TAL of 12.983 million lb (5,889 mt). Under the increased TAL implemented on January 19, 2007, following the Secretarial determination that the rebuilding time frame could be extended and the 2007 TAL increased, further analysis indicated that the Alternative 2 measures would constrain recreational landings to 55 percent of the larger recreational harvest limit resulting from increasing the TAL. While this would satisfy both the objectives of the FMP and the Magnuson-Stevens Act, the public submitted comments in response to the 2007 recreational management measures proposed rule (72 FR 12158, March 15, 2007) that the Alternative 2 measures were unduly restrictive. NMFS agreed and indicated at that time that other alternatives would be evaluated for their effectiveness in allowing a higher percentage of the recreational harvest limit under the increased TAL to be attained while constraining landings to the 2007 limit

and still ensuring compliance with the FMP and Magnuson-Stevens Act.

The measures detailed in this proposed rule (i.e., Alternative 3) for an 18.5-inch (46.99-cm) minimum fish size with a 4-fish possession limit and a year-round season, would constrain landings to 90 percent of the harvest limit (2,181,735 fish). Again, the IRFA contained analysis on the impact of the Alternative 3 size limit for 2007. Under Alternative 3, impacted trips are defined as trips taken in 2006 that landed at least one summer flounder smaller than 18.5 inches (46.99 cm) or landed more than one summer flounder. The analysis concluded that implementation of the Alternative 3 measures could affect 4.06 percent of the party/charter vessel trips in the NE, including those trips where no summer flounder were caught. While the percent of potentially affected trips is only slightly different, the Alternative 3 measures would afford additional fish to be kept by anglers (i.e., 4 fish as compared to 1 fish) and would allow a greater number of fish to be landed under the increased recreational harvest limit and thereby is the alternative with the least economic impact on small entities while still achieving the required objectives of the FMP and the Magnuson-Stevens Act.

Compared to the measures implement through conservation equivalency for 2007, the Alternative 3 measures would provide less restrictive minimum fish sizes for Rhode Island and New York, while maintaining the same size limit for Virginia. All other states' measures for 2007 were smaller than the Alternative 3 minimum fish size of 18.5 inches (46.99 cm). A 4-fish possession limit would maintain the same limits in place for New York, Delaware, and Maryland; all other states' possession limits were higher than 4-fish under conservation equivalency. The year-round season would be equal to or longer than the 2007 state measures implemented under conservation equivalency.

Under the Council's proposed coastwide measures (i.e., Alternative 2: A 19-inch (48.26-cm) minimum fish size, a 1-fish possession limit, and no closed season), each state's conservation equivalency measures were smaller than 19 inches (48.26 cm) except New York. Each state had possession limits higher than one fish, and four states (Rhode Island, Connecticut, New Jersey, and Virginia) had seasons that were less shorter January 1–December 31; all other states had year-long seasons.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action.

## List of Subjects in 50 CFR Part 648

Fisheries and Fishing.

Dated: September 21, 2007.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be 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 § 648.103, paragraph (b) is revised to read as follows:

#### § 648.103 Minimum fish sizes.

\* \* \* \* \*

(b) Unless otherwise specified pursuant to § 648.107, the minimum size for summer flounder is 18.5 inches (46.99 cm) TL for all vessels that do not qualify for a moratorium permit, and charter boats holding a moratorium permit if fishing with more than three crew members, or party boats holding a moratorium permit if fishing with passengers for hire or carrying more than five crew members.

\* \* \* \* \*

3. In § 648.105, the first sentence of paragraph (a) is revised to read as follows:

#### § 648.105 Possession restrictions.

\* \* \* \* \*

(a) Unless otherwise specified pursuant to § 648.107, no person shall possess more than four summer flounder in, or harvested from, the EEZ, unless that person is the owner or operator of a fishing vessel issued a summer flounder moratorium permit, or is issued a summer flounder dealer permit. \* \* \*

\* \* \* \* \*

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