

• FAR clause 52.212-4(p) and the "tailoring" provision at FAR 12.302, do not reach the level of commercial standards and that unlimited consequential or other incidental or special damages are not necessary and are, in fact, counterproductive to efficient procurement, raising costs and establishing barriers to commercial companies considering whether to do business with the Federal Government;

• Although FAR 12.302 permits contracting officers to tailor the limitation of liability clause at FAR 52.212-4(p), some companies assert that contracting officers are unwilling to do so, leaving contractors with a take-it or leave-it option and contracts that deviate from the commercial marketplace, making contractors in general less willing to sign on to such contracts;

• The commercial practice, unlike FAR 52.212-4(p), that waives liability for consequential damages resulting from any defect or deficiencies in accepted items, provides for a complete waiver of consequential damages;

• Contractors would make risk decisions and negotiate Government contracts without having to add an uncertainty premium as to liability protection, if FAR Part 12 were appropriately amended to reflect commercial practices; and

• Contractors also request that we make the waiver of consequential damages for commercial products and services available under other provisions of the FAR.

Similarly, the General Accounting Office and periodically GSA's IG raise concerns regarding GSA's right to access and examine contractor records after contract award. GSA's primary vehicle for conducting post-award audits is GSAR 552.215-70, Examination of Records by GSA, that gives the Administrator of GSA, or any duly authorized representative, typically the GSA Inspector General's Office of Audits, access to and the right to examine contractor records relating to over billings, billing errors, compliance with the Industrial Funding Fee (IFF) clause of the contract, and compliance with the Price Reduction Clause under MAS contracts.

In addition to the GSA Examination of Records clause, GSA may use a number of other authorities to conduct a post-award review of a contractor's records. These other authorities include FAR 52.212-5 which authorizes the Comptroller General of the United States to access and examine a contractor's directly pertinent records involving transactions related to the contract; GSAR 515.209-70(b) that

permits a contracting officer to modify the GSA Examination of Records Clause to define the specific area of audit (e.g., the use or disposition of Government-furnished property, compliance with price reduction clause, etc.), and the right of the GSA Inspector General to issue subpoenas for contractor records under the Inspector General Act of 1978.

Contractors' major concerns with GSA's post-award audit authority include complaints that they are too broad and not consistent with commercial contract practices.

In consideration of the above concerns, we have questions as to how the taxpayer may benefit from any revisions to the GSAR to address contractor concerns regarding limitation of liability or post-award audits. We are also interested in learning what, if any, impact the Services Acquisition Reform Act of 2002 and 2003 has on the issue of revising the GSAR to address limitations of liability.

In this advance notice of proposed rulemaking and notice of public meeting, GSA is seeking input from both Government and industry on whether the GSAR should be revised to waive consequential damages in the purchase of commercial items under FAR Parts 12, 13, 14, and 15 and whether GSA should modify its policy and practices with regard to the addition of post award audit clauses into contracts it awards.

Dated: March 4, 2005.

**Rodney P. Lantier,**

*Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 050302053-5053-01; I.D. 022805C]

RIN 0648-AS24

#### Fisheries of the Northeastern United States; Proposed 2005 Specifications for the Spiny Dogfish Fishery

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

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

**SUMMARY:** NMFS proposes specifications for the spiny dogfish fishery for the 2005 fishing year, which is May 1, 2005, through April 30, 2006. The implementing regulations for the Spiny Dogfish Fishery Management Plan (FMP) require NMFS to publish specifications for the upcoming fishing year and to provide an opportunity for public comment. The intent of this rulemaking is to specify the commercial quota and other management measures, such as possession limits, to rebuild the spiny dogfish resource.

**DATES:** Public comments must be received (see **ADDRESSES**) no later than 5 p.m., EST, on March 28, 2005.

**ADDRESSES:** Comments on the proposed specifications should be sent:

• Mail: Paper, disk, or CD-ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298. Mark on the outside of the envelope, "Comments—2005 Spiny Dogfish Specifications."

• FAX: Fax comments to (978) 281-9135.

• E-mail: E-mail comments to [DOG2005@noaa.gov](mailto:DOG2005@noaa.gov). Include in the subject line of the e-mail comment the following document identifier: "Comments—2005 Dogfish specifications."

• Comments may also be submitted electronically through the Federal e-Rulemaking portal: <http://www.regulations.gov>.

Copies of supporting documents used by the Joint Spiny Dogfish Committee and the Spiny Dogfish Monitoring Committee; the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis (EA/RIR/IRFA); and the Essential Fish Habitat Assessment (EFHA) are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Federal Building, Room 2115, 300 South Street, Dover, DE 19904. The EA, RIR, IRFA, and EFHA are accessible via the Internet at <http://www.nero.noaa.gov/nero/>.

**FOR FURTHER INFORMATION CONTACT:** Eric Jay Dolin, Fishery Policy Analyst, (978)281-9259, fax (978)281z69135.

#### SUPPLEMENTARY INFORMATION:

##### Background

Spiny dogfish were declared overfished by NMFS on April 3, 1998, and added to that year's list of overfished stocks in the *Report on the Status of the Fisheries of the United States*, prepared pursuant to section 304 of the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act). Consequently, the Magnuson-Stevens Act required the preparation of measures to end overfishing and to rebuild the spiny dogfish stock. A joint FMP was developed by the Mid-Atlantic and New England Fishery Management Councils (Councils) during 1998 and 1999. The Mid-Atlantic Fishery Management Council (MAFMC) was designated as the administrative lead on the FMP.

The regulations implementing the FMP at 50 CFR part 648, subpart L, outline the process for specifying annually the commercial quota and other management measures (e.g., minimum or maximum fish sizes, seasons, mesh size restrictions, possession limits, and other gear restrictions) for the spiny dogfish fishery to achieve the annual target F specified in the FMP. The target F for the 2005 fishing year is not to exceed 0.08.

The Spiny Dogfish Monitoring Committee (Monitoring Committee), comprised of representatives from states; MAFMC staff; New England Fishery Management Council (NEFMC) staff; NMFS staff; and two non-voting, ex-officio industry representatives (one each from the MAFMC and NEFMC regions) is required to review annually the best available information and to recommend a commercial quota and other management measures necessary to achieve the target F for the upcoming fishing year. The Council's Joint Spiny Dogfish Committee (Joint Committee) then considers the Monitoring Committee's recommendations and any public comment in making its recommendation to the two Councils. Afterwards, the MAFMC and the NEFMC make their recommendations to NMFS. NMFS reviews those recommendations to assure they are consistent with the FMP, and may modify them if necessary. NMFS then publishes proposed measures for public comment.

#### **Monitoring Committee Recommendations**

The Monitoring Committee met on September 24, 2004, and developed recommendations for the 2005 fishery based on stock conditions estimated from the latest stock status updates. According to the latest (2004) spring survey values, the 3-year moving average of total stock biomass decreased from 916 million lb (415 million kg) in 2001–2003 to 857 million lb (389 million kg) in 2002–2004. Mature female biomass decreased from 144 million lb (65.3 million kg) in 2001–2003 to 132 million lb (59.9 million kg)

in 2002–2004. Pup abundance, however, increased from 338 thousand lb (153,314 kg) in 2001–2003 to 1.440 million lb (653,173 kg) in 2002–2004.

Although the FMP stipulates a target fishing mortality rate of  $F=0.08$  for the upcoming fishing year, the 37<sup>th</sup> Northeast Regional Stock Assessment Review Committee (SARC — September 2003) recommended that total removals not exceed the amount corresponding to  $F=0.03$  ( $F_{rebuild}$ ). The  $F=0.08$  target stipulated in the FMP was based on the expectation, in 1999, that mature female biomass would recover to 90 percent  $SSB_{max}$  by 2003. The management advice provided by the 37<sup>th</sup> SARC was based on its review of the 2003 stock assessment, and stated that, “given the low current spawning biomass, poor recruitment and reduced pup survivorship, the SARC recommends total removals (landings, discards, Canadian catch) below those derived from the estimated rebuilding  $F$  (0.03). Targeting females should be avoided.”

Because the updated stock status information reviewed by the Monitoring Committee indicated that mature female biomass had not increased in 2004 compared to 2003 estimates, the Monitoring Committee could find no biological justification for deviating from the advice of the 37<sup>th</sup> SARC. The Monitoring Committee, therefore, recommended maintaining the status quo management measures for the upcoming fishing year to encourage the rebuilding of the mature female biomass. These measures are: an annual incidental catch quota of 4 million lb (1.81 million kg) divided into two semi-annual quota periods (quota period 1 (May 1, 2005–October 31, 2005) = 2.316 million lb (1.05 million kg), and quota period 2 (November 1, 2005–April 30, 2006) = 1.684 million lb (763,849 kg)), and possession limits of 600 lb (272 kg) for quota period 1 and 300 lb (136 kg) for quota period 2 (vessels are prohibited from landing more than the specified amount in any one calendar day).

#### **Joint Committee Recommendations**

The Joint Committee met on October 4, 2004, and recommended that, for the 2005 fishing year (May 1, 2005–April 30, 2006), the Councils adopt a quota of 4 million lb (1.81 million kg), and that possession limits be set at 1,500 lb (680 kg) of male spiny dogfish (i.e., a prohibition on the possession of female spiny dogfish) for the entire year. In the view of the Joint Committee, the increased possession limits would accommodate the high volume demand required by the processing sector of the spiny dogfish fishery, while the

prohibition on possession of female spiny dogfish would help protect that component of the stock. At its October 4, 2004, meeting, the MAFMC reviewed the Monitoring Committee and Joint Committee recommendations, and adopted the Joint Committee's recommended specifications for the 2005 fishing year. The NEFMC, on the other hand, at its November 18, 2004, meeting, endorsed the Monitoring Committee's recommendations; namely, maintaining the status quo.

#### **Alternative Adopted by the Atlantic States Marine Fisheries Commission (ASMFC)**

On November 9, 2004, the ASFMC Spiny Dogfish and Coastal Shark Management Board approved specifications for the 2005 fishing year, which are the same as the Federal status quo.

#### **Proposed 2005 Measures**

NMFS reviewed both Councils' recommendations and concluded that maintaining the status quo, which is the same as the Monitoring Committee's recommendation, would better assure that the target F is not exceeded. NMFS proposes a commercial spiny dogfish quota of 4 million lb (1.81 million kg) for the 2005 fishing year to be divided into two semi-annual periods as follows: 2,316,000 lb (1.05 million kg) for quota period 1 (May 1, 2005 - Oct. 31, 2005); and 1,684,000 lb (763,849 kg) for quota period 2 (Nov. 1, 2005 - April 30, 2006). In addition, NMFS proposes to maintain possession limits of 600 lb (272 kg) for quota period 1, and 300 lb (136 kg) for quota period 2, to discourage a directed fishery. The directed fishery has traditionally targeted large, mature female spiny dogfish, the stock component that is most in need of protection and rebuilding. Maintaining the limits of 600 lb (272 kg) and 300 lb (136 kg) for quota periods 1 and 2, respectively, would allow for the retention of spiny dogfish caught incidentally while fishing for other species, but discourage directed fishing and, therefore, provide protection for mature female spiny dogfish.

Maintaining the status quo would also be consistent with the measures being implemented under the ASMFC's Interstate Fishery Management Plan in state waters. This would have the benefit of establishing consistent management measures in Federal and state jurisdictions.

#### **Classification**

This action is authorized by 50 CFR part 648 and has been determined to be

not significant for purposes of E.O. 12866.

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, which describes the economic impacts this proposed rule, if adopted, would have on small entities. A copy of the IRFA can be obtained from the Council or NMFS (see **ADDRESSES**) or via the Internet at <http://www.nero.noaa.gov>. A summary of the analysis follows:

#### **Statement of Objective and Need**

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

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

All of the potentially affected businesses are considered small entities under the standards described in NMFS guidelines because they have gross receipts that do not exceed \$3.5 million annually. Information from the 2003 fishing year was used to evaluate impacts of this action, as that is the most recent year for which data are complete. According to unpublished NMFS permit file data, 3,025 vessels possessed Federal spiny dogfish permits in 2003, while 94 of these vessels contributed to overall landings.

#### **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.

#### **Minimizing Significant Economic Impacts on Small Entities**

The IRFA considered three alternatives. The action recommended in this proposed rule includes a

commercial quota of 4 million lb (1.81 million kg), and possession limits of 600 lb (272 kg) during quota period 1 and 300 lb (136 kg) during quota period 2. Alternative 2 evaluates the MAFMC proposal, which would set a 4-million-lb (1.81 million kg) quota, with possession limits of 1,500 lb (680 kg) of male-only spiny dogfish in both quota periods. Alternative 3 evaluates the impact of having no management measures (no action).

Because, under Alternative 1, the specifications would remain unchanged, revenues from dogfish harvest under this alternative should be equivalent to the status quo, except for changes in market value. Note, however, that the 2003 quota (4.00 million lb (1.81 million kg)) is 27.0 percent more than what was actually landed (3.14 million lb (1.42 million kg)). Therefore, unlike previous years, in which the quota was exceeded, the federally permitted fleet should not experience a decrease in dogfish fishing opportunity, were this alternative to be implemented.

In addition to the quota of 4.0 million lb (1.81 million kg), Alternative 1 includes continuation of status quo possession limits of 600 lb (272 kg) in quota period 1 and 300 (176 kg) during quota period 2 in 2004. Continuation of these possession limits in 2005 is, therefore, not expected to result in significant revenue loss. These very low possession limits were recommended for the explicit purpose of eliminating the directed harvest of spiny dogfish. While the short-term economic impacts of the status quo possession limits are negative relative to higher possession limits (Alternative 2) or an unregulated fishery (Alternative 3), Alternative 1 rebuilds the stock fastest and thus economic and social benefits of a recovered stock will be realized more quickly.

No gross revenue impacts are anticipated as a function of the Alternative 2 quota relative to the status quo/Alternative 1, since the recommended quotas are identical. Additionally, the potential for increases

in revenue from the larger possession limit allowance is precluded by the implementation of status quo possession limits by the ASMFC. This leaves the male-only possession restriction as the only potential source of revenue impacts under Alternative 2. The likelihood of a directed male-only spiny dogfish fishery developing in the Exclusive Economic Zone is low, since the fact that females attain a larger maximum size makes them more generally marketable. As such, it likely that retention of spiny dogfish in the Exclusive Economic Zone will decrease under Alternative 2. This would represent a slight loss, given that an estimated 1.8 percent of the total 2003 spiny dogfish landings came from the Exclusive Economic Zone. As such, it is unlikely that this alternative will produce significant revenue impacts.

Given that no quota is specified in Alternative 3, landings are expected to return to the levels approximately equal to those observed in the unregulated period of the fishery (about 25 million lb (11.3 million kg)). This would constitute a 525-percent increase in landings compared to the status quo (4.0 million lb (1.81 million kg)) and a 696-percent increase in landings compared to actual 2003 landings (3.14 million lb (1.42 million kg)). Although the short-term social and economic benefits of an unregulated fishery would be much greater than those associated with Alternatives 1 and 2, fishing mortality is expected to rise above the threshold level that allows the stock to replace itself such that stock rebuilding could not occur. In the long term, unregulated harvest would lead to depletion of the spiny dogfish population, which would eventually eliminate the spiny dogfish fishery altogether.

Dated: March 7, 2005.

**Rebecca Lent,**

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

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