

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 000727220-0220-01; I.D. 072400A]

RIN 0648-AO32

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; Emergency for the Summer Flounder Fishery

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

ACTION: Emergency interim rule; request for comments.

SUMMARY: NMFS amends the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) and its implementing regulations to revise the objective to be achieved by the annual specifications for the 2001 summer flounder fishery from obtaining a fishing mortality rate (F) target to obtaining a biomass (B) target and to require that, if a 2000 state summer flounder commercial quota allocation is not fully harvested, the underage be added to that state's 2001 allocation. The intent of this action is to comply with a decision issued on April 25, 2000, by the United States Court of Appeals for the District of Columbia Circuit (Court) and to protect the summer flounder stock from overfishing.

DATES: This emergency interim rule is effective from August 2, 2000, through January 29, 2001. Comments must be received no later than 5 p.m. EDT September 1, 2000.

ADDRESSES: Copies of the Regulatory Impact Review are available from Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298. Written comments on this emergency interim rule should be sent to Patricia A. Kurkul at the same address. Comments may also be sent via facsimile (fax) to (978)281-9135. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Regina L. Spallone, Fishery Policy Analyst, phone (978)281-9221; fax (978)281-9135; e-mail regina.l.spallone@noaa.gov.

SUPPLEMENTARY INFORMATION:**Background**

The summer flounder fishery is managed jointly by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission). The summer flounder stock is currently overfished. The regulations implementing the FMP, at § 648.100, outline the process for specifying annually the catch limits for the commercial and recreational fisheries, as well as other management measures (e.g., mesh requirements, minimum fish sizes, season, and area restrictions) intended to achieve the annual F target set forth in the FMP.

On April 25, 2000, the Court issued an opinion on a challenge to the 1999 summer flounder specifications brought by a number of environmental groups. The Court remanded the 1999 summer flounder total quota (as specified by commercial and recreational harvest limits) to NMFS "for further proceedings consistent with [the] opinion." The opinion found that (1) priority must be given to conservation measures, and, only when two different plans achieve similar conservation goals, may the agency consider adverse economic consequences, (2) management measures must provide at least a 50-percent probability of achieving the target reference point, and (3) reliance on conservation measures without quantified benefits is not acceptable to supplement an insufficient quota recommendation. The 1999 total quota, when adopted, relied on unquantified factors that were found insufficient by the Court to supplement the quantified 18-percent likelihood of meeting the conservation goals of the FMP.

In setting the 2000 total quota, unquantified factors were also relied upon to supplement the 25-percent quantified likelihood of not exceeding the conservation goal. NMFS published final specifications for the 2000 summer flounder fishery on May 24, 2000 (65 FR 33486). In that final rule, NMFS stated that it intended to revise the 2000 summer flounder total quota by August 1, 2000, to set it at a level with at least a 50-percent probability of not exceeding the F target as required by the Court's decision.

After reviewing the best available information on the status of the summer flounder stock, and to comply with the Court's decision, NMFS is taking, through this emergency interim rule, an action that differs from that anticipated in the May 24, 2000, final rule. This action establishes a clearer standard to be met in setting the 2001 summer

flounder specifications. Specifically, NMFS is establishing a requirement that the 2001 total quota be set at a level that will achieve, with at least a 50-percent probability, the biomass level that would have been achieved at the end of 2001 if the F target had been met in 1999 and 2000 and would have been met in 2001, provided that the resultant F does not exceed the F that results in maximum yield per recruit (F_{max}). This requirement will compensate for the failure of the specifications to achieve the FMP's F target in 1999 and, based on preliminary analysis, in 2000 and put the rebuilding program for summer flounder back on schedule.

The results of an updated assessment of the summer flounder stock peer reviewed in June 2000 will be available in August. The new assessment will provide the best available scientific data on the summer flounder stock, including updated estimates of F and stock biomass. The new assessment will be used to make the necessary projections for the 2001 specifications.

The fishing year for summer flounder began January 1, 2000. Many states have already harvested a significant portion of their commercial allocation, and approximately 75 percent of the coastwide recreational fishery will be concluded by the end of August. It would, thus, be impracticable, if not impossible, for all of the affected states to implement needed management measures to respond to a mid-year adjustment in 2000. In many cases, states' commercial fisheries would immediately close as a result of such an inseason change, thus increasing summer flounder discards. However, this action does contain a measure that will encourage efforts by the states to reduce the commercial harvest for the remainder of this year. This measure is a provision to credit the underharvest of the 2000 commercial quota by individual states. Underages for a state in 2000 would be applied to that state's 2001 allocation and may, thus, reduce the impacts on the commercial sector in those states in that year. However, as noted in the final specifications, adjustments to the 2000 specifications for overages in the 1999 allocation of quota published in that rule were preliminary and subject to change. NMFS will adjust for any additional overages that are identified as those data become final. NMFS will publish those adjustments in the *Federal Register* as required by the FMP.

A similar overage and underage mechanism is not being established for the recreational fishery. Although data collected by the Marine Recreational Fisheries Statistics Survey are used to

estimate the annual recreational harvest of summer flounder, the use of those data to make deductions from the recreational harvest limit for the following year may result in annual quota changes reflective of inter-annual variability in the survey results rather than in actual landings.

Preliminary analyses based on the new stock assessment indicate at this time that the B quota would be 67,500 mt. A total quota with a 50-percent probability of achieving that target at the end of 2001 would be approximately 17.91 million lb (8,125 mt); the total quota with a 60-percent probability would be approximately 17.37 million lb (7,881 mt); and the total quota with a 75-percent probability would be approximately 16.57 million lb (7,515 mt). In the annual specification process for the 2001 fishing year, the Council will use the final assessment results to estimate what the biomass level would have been, had the F targets in 1999 and 2000 been achieved. The total summer flounder quota for 2001 will be set at a level that is expected to result in that biomass at the end of 2001. The total quota selected must have at least a 50-percent probability of achieving the required B target. The total quota will be allocated 60 percent to the commercial sector and 40 percent to the recreational sector, as currently specified in the FMP. Landings in excess of a state's commercial allocation will be deducted from that state's allocation in 2001.

In addition, this rule establishes a new provision that requires any the underharvest of an individual state's commercial quota in 2000 to be applied to the final specifications for 2001 for that state. The overage and underage adjustments will be made when final 2000 landings have been enumerated.

Classification

This emergency rule has been determined to be not significant for purposes of E.O. 12866.

Providing prior notice and opportunity for comment would be contrary to the public interest because the framework established by this rule must be in place before the August meetings of the technical Monitoring Committee and Council so that the Committee and Council may recommend specifications for the 2001 fisheries that address the Court decision and are timely. Delay in instituting the framework would translate into a delay in setting the 2001 specifications and into a delay in addressing the Court decision in an equitable manner for the different states involved. Therefore, the Assistant Administrator for Fisheries, NOAA (AA), finds good cause under 5

U.S.C. 553(b)(B) to waive the requirement for prior notice and opportunity for comment.

Also, providing a 30-day delay in the effective date of this rule is unnecessary, because this rule merely establishes a framework designed to guide the Committee and Council in the specification process for the 2001 fishery and does not impose requirements on members of the public with which they have to comply. Therefore, the AA finds good cause under 5 U.S.C. 553(d)(3) not to delay for 30 days the effective date of this rule.

The President has directed Federal agencies to use plain language in their communications with the public, including regulations. To comply with this directive, we seek public comment on any ambiguity or unnecessary complexity arising from the language used in this final rule.

This emergency rule is exempt from the analytical requirements of the Regulatory Flexibility Act because prior notice and comment is not required by 5 U.S.C. 553 or any other law.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: July 31, 2000.

Penelope D. Dalton,

*Assistant Administrator for Fisheries,
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 § 648.100, paragraphs (a) through (e) are suspended, and paragraphs (f) through (j) are added to read as follows:

§ 648.100 Catch quotas and other restrictions.

* * * * *

(f) *Annual review for the 2001 measures.* The Summer Flounder Monitoring Committee shall review the following data on or before August 15, 2000, to determine the biomass level that would have resulted in 2001 (B_{2001}), assuming the target fishing mortality rate (F) been achieved in 1999 and 2000 and would be achieved in 2001, provided that the resultant F does not exceed F_{max} . The Summer Flounder Monitoring Committee shall also review the following data to determine the allowable levels of fishing and other restrictions necessary in 2001 to accomplish, with at least a 50-percent

probability of success, the specified B_{2001} by the end of 2001: Commercial and recreational catch data; current estimates of fishing mortality; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; sea sampling and winter trawl survey data or, if sea sampling data are unavailable, length frequency information from the winter trawl survey and mesh selectivity analyses; impact of gear other than otter trawls on the mortality of summer flounder; and any other relevant information.

(g) *Recommended measures for 2001.*

Based on the review outlined in paragraph (f) of this section, the Summer Flounder Monitoring Committee shall recommend to the Demersal Species Committee of the MAFMC and the Commission the following measures to assure that the B_{2001} is achieved with at least a 50-percent probability of success:

(1) Commercial quota set from a range of 0 to the maximum allowed to achieve the specified B_{2001} .

(2) Commercial minimum fish size.

(3) Minimum mesh size.

(4) Recreational possession limit set from a range of 0 to 15 summer flounder to achieve the specified B_{2001} .

(5) Recreational minimum fish size.

(6) Recreational season.

(7) Restrictions on gear other than otter trawls.

(8) Adjustments to the exempted area boundary and season specified in § 648.104(b)(1) by 30-minute intervals of latitude and longitude and 2-week intervals, respectively, based on data specified in paragraph (f) of this section to prevent discarding of sublegal sized summer flounder in excess of 10 percent, by weight.

(h) *Annual fishing measures for 2001.* The Demersal Species Committee shall review the recommendations of the Summer Flounder Monitoring Committee. Based on these recommendations and any public comment, the Demersal Species Committee shall recommend to the MAFMC measures necessary to assure, with at least a 50-percent probability of success, that B_{2001} will be achieved. The MAFMC shall review these recommendations and, based on the recommendations and any public comment, recommend to the Regional Administrator measures necessary to assure, with at least a 50-percent probability of success, that B_{2001} will be achieved. The MAFMC's recommendations must include supporting documentation, as appropriate, concerning the

environmental and economic impacts of the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the Commission. After such review, the Regional Administrator will publish a proposed rule in the **Federal Register** by October 15 to implement a coastwide commercial quota and recreational harvest limit and additional management measures for the commercial fishery, and will publish a proposed rule in the **Federal Register** by February 15 to implement additional management measures for the recreational fishery, if he/she determines that such measures are necessary to assure, with at least a 50-percent probability of success, that B₂₀₀₁ will be achieved. After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement the measures necessary to assure, with at least a 50-percent probability of success, that B₂₀₀₁ will be achieved.

(i) *Distribution of the annual quota for 2001.* (1) The annual commercial quota for 2001 will be distributed to the states, based upon the following percentages:

ANNUAL COMMERCIAL QUOTA SHARES

State	Share (percent)
Maine	0.04756
New Hampshire	0.00046
Massachusetts	6.82046
Rhode Island	15.68298
Connecticut	2.25708
New York	7.64699
New Jersey	16.72499
Delaware	0.01779
Maryland	2.03910
Virginia	21.31676
North Carolina	27.44584

(2) All summer flounder landed for sale in a state shall be applied against that state's annual commercial quota, regardless of where the summer flounder were harvested. Any overages of the commercial quota landed in any state will be deducted from that state's annual quota for the following year. If landings in any state implementing a commercial quota for the year 2000 are less than that state's allocation, the amount of the unharvested quota (i.e., quota underage), will be added to that state's 2001 allocation of commercial quota.

(j) *Quota transfers and combinations.* Any state implementing a state commercial quota for summer flounder may request approval from the Regional Administrator to transfer part or all of

its annual quota to one or more states. Two or more states implementing a state commercial quota for summer flounder may request approval from the Regional Administrator to combine their quotas, or part of their quotas, into an overall regional quota. Requests for transfer or combination of commercial quotas for summer flounder must be made by individual or joint letter(s) signed by the principal state official with marine fishery management responsibility and expertise, or his/her previously named designee, for each state involved. The letter(s) must certify that all pertinent state requirements have been met and identify the states involved and the amount of quota to be transferred or combined.

(1) Within 10 working days following the receipt of the letter(s) from the states involved, the Regional Administrator shall notify the appropriate state officials of the disposition of the request. In evaluating requests to transfer a quota or combine quotas, the Regional Administrator shall consider whether:

(i) The transfer or combination would preclude the overall annual quota from being fully harvested.

(ii) The transfer addresses an unforeseen variation or contingency in the fishery.

(iii) The transfer is consistent with the objectives of the Summer Flounder FMP and Magnuson-Stevens Act.

(2) The transfer of quota or the combination of quotas will be valid only for the calendar year for which the request was made and will be effective upon the filing by NMFS of a notice of the approval of the transfer or combination with the Office of the Federal Register.

(3) A state may not submit a request to transfer quota or combine quotas if a request to which it is party is pending before the Regional Administrator. A state may submit a new request when it receives notice that the Regional Administrator has disapproved the previous request or when notice of the approval of the transfer or combination has been filed at the Office of the Federal Register.

(4) If there is a quota overage among states involved in the combination of quotas at the end of the fishing year, the overage will be deducted from the following year's quota for each of the states involved in the combined quota. The deduction will be proportional, based on each state's relative share of the combined quota for the previous year. If there is a quota underage among one or more of the states involved in the combination of quotas at the end of the 2000 fishing year, the underage will be

added to the 2001 quota for each of the states involved in the combined quota. The addition will be proportional, based on each state's relative share of the combined quota for the previous year. A transfer of quota or combination of quotas does not alter any state's percentage share of the overall quota specified in paragraph (i) of this section.

3. In § 648.101, paragraph (a) is suspended and paragraph (c) is added to read as follows:

§ 648.101 Closures.

* * * * *

(c) *EEZ closure.* The Regional Administrator shall close the EEZ to fishing for summer flounder by commercial vessels for the remainder of the calendar year by publishing notification in the **Federal Register** if he/she determines that the inaction of one or more states will cause the biomass target (B₂₀₀₁) identified in § 648.100(f) not to be achieved or if the commercial fisheries in all states have been closed. The Regional Administrator may reopen the EEZ if earlier inaction by a state has been remedied by that state or if commercial fisheries in one or more states have been reopened without causing B₂₀₀₁ not to be achieved.

4. In § 648.104, the last sentence of paragraph (c) is suspended and paragraph (g) is added to read as follows:

§ 648.104 Gear restrictions.

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(g) *Net modifications.* No vessel subject to this part shall use any device, gear, or material, including, but not limited to nets, net strengtheners, ropes, lines, or chafing gear, on the top of the regulated portion of a trawl net; except that, one splitting strap and one bull rope (if present) consisting of line or rope no more than 3 inches (7.2 cm) in diameter may be used if such splitting strap and/or bull rope does not constrict, in any manner, the top of the regulated portion of the net, and one rope no greater than 0.75 inches (1.9 cm) in diameter extending the length of the net from the belly to the terminus of the codend along the top, bottom, and each side of the net. "Top of the regulated portion of the net" means the 50 percent of the entire regulated portion of the net that (in a hypothetical situation) will not be in contact with the ocean bottom during a tow if the regulated portion of the net were laid flat on the ocean floor. For the purpose of this paragraph (g), head ropes shall not be considered part of the top of the regulated portion of a trawl net. A vessel shall not use any means or mesh

configuration on the top of the regulated portion of the net, as defined in paragraph (e) of this section, if it obstructs the meshes of the net or otherwise causes the size of the meshes of the net while in use to diminish to a size smaller than the minimum specified in § 648.104(a).

5. In § 648.107, paragraphs (a) and (b) are suspended and paragraphs (c) and (d) are added to read as follows:

§ 648.107 Conservation equivalent measures for the recreational summer flounder fishery.

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(c) Through September 5, 2000, states may implement on an annual basis conservation equivalent measures that reduce the recreational catch to the same extent as the annual Federal summer flounder measures specified under § 648.100(h) to achieve the recreational harvest limit in any year. These measures would be a different combination of minimum fish sizes, possession limits, and closed seasons

that are the conservation equivalent of those Federal summer flounder measures specified on an annual basis.

(d) A determination of equivalency would be made annually for any state proposing alternative recreational measures by the Summer Flounder Technical Committee of the Commission. Conservation equivalent measures may be implemented by any state without a determination of equivalency by the Summer Flounder Technical Committee review, but only if states use the state-specific tables provided by the Commission and maintain a 15-inch (38-cm) or greater minimum fish size.

(1) Once a state receives a determination of equivalency from the Summer Flounder Technical Committee or a state implements conservation equivalent measures contained in the state-specific table provided by the Commission, the Commission will recommend to the Regional Administrator that a notification be

published in the **Federal Register** to waive the annual Federal summer flounder measures specified under § 648.100(h) and to notify vessel permit holders of the equivalent measures approved by the Summer Flounder Technical Committee for landing summer flounder in that state.

(2) States electing not to implement conservation equivalent measures or states that did not receive a determination of equivalency from the Summer Flounder Technical Committee and not implementing conservation equivalent measures contained in the state-specific table provided by the Commission would be required to implement the annual Federal summer flounder measures specified under § 648.100(h) in accordance with the provisions of the Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries.

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