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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 111220786-1781-01]

RIN 0648-XA795

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; Interim 2012 Summer Flounder, Scup, and Black Sea Bass Specifications; 2012 Research Set-Aside Projects

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

ACTION: Interim specifications; request for comments.

SUMMARY: NMFS is implementing interim catch levels and management measures, called specifications, for the 2012 summer flounder, scup, and black sea bass fisheries, and is also providing notice of projects likely to request research set-aside related to exempted fishing permits. Interim specifications are necessary to ensure that fishing quotas for the summer flounder, scup, and black sea bass fisheries are in place at the start of the fishing year on January 1, 2012, to ensure the three species are not overfished or subject to overfishing in 2012. Notice of exempted fishing permit requests is necessary to allow public comment on the fishing regulation exemptions requested by research set-aside participants.

DATES: Effective January 1, 2012, through December 31, 2012; comments must be received on or before [insert date 30 days after the date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by NMFS-NOAA-2011-0280, by any one of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NMFS-NOAA-2011-0280 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- Fax: (978) 281-9135, Attn: Comments on 2012 Interim Summer Flounder, Scup, and Black Sea Bass Specifications, NMFS-NOAA-2011-0280
- Mail and hand delivery: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: “Comments on 2012 Interim Summer Flounder, Scup, and Black Sea Bass Specifications, NMFS-NOAA-2011-0280.”

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to

remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the 2012 specifications document, including the Environmental Assessment Analysis (EA), is available from Patricia Kurkul, Northeast Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. This document is also accessible via the Internet at <http://www.nero.noaa.gov>.

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

SUPPLEMENTARY INFORMATION:

Specifications

General Specification Background

Fishery specifications include various catch and landing subdivisions, including the commercial and recreational sector annual catch limits (ACLs), annual catch targets (ACTs), sector-specific landing limits, (i.e., the commercial fishery quota and recreational harvest limit) and research set-aside (RSA) established for the upcoming fishing year. An explanation of each subdivision appears later in this rule.

Rulemaking for measures used to manage the recreational fisheries for these three species occurs separately and typically takes place in the first quarter of the fishing year. The Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) and its implementing regulations outline the Council's process for establishing specifications. Implementing regulations for these fisheries are found at 50 CFR part 648, subpart A (General Provisions), subpart G (summer flounder), subpart H (scup), and subpart I (black sea bass).

The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission) cooperatively manage the summer flounder, scup, and black sea bass fisheries. The management units specified in the FMP include summer flounder (Paralichthys dentatus) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina northward to the U.S./Canada border, and scup (Stenotomus chrysops) and black sea bass (Centropristis striata) in U.S. waters of the Atlantic Ocean from 35° 13.3' N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, NC) northward to the U.S./Canada border.

All requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), including the 10 national standards, also apply to specifications.

Background for the 2012 Specifications

In a typical year, the Council's Scientific and Statistical Committee (SSC) reviews updated stock assessment information in July as the starting point in the specifications process. The specification process also allows changes to a select number of management measures such as commercial minimum fish size and minimum trawl net mesh sizes. The Council convenes in August to make specification recommendations to NMFS. NMFS reviews these recommendations for consistency with applicable law and other requirements before proceeding to implement the measures via notice-and-comment rulemaking. The rulemaking process usually takes place from October-December. Final specifications are typically in place on or about January 1, as this is both the start of the fishing year, and the annual date NMFS has used to implement the requirement specified in a 1997 Court order (North Carolina Fisheries Assoc. Inc. et al. v. Daley Civil NO. 2:97cv339 (RGD)) directing the agency to finalize each year's fishing quota within a reasonable period of time.

For the 2012 summer flounder, scup, and black sea bass specifications, the rulemaking process has encountered some complications. As usual, the SSC and Council met in July and August, respectively, and conveyed recommendations to NMFS for review, rulemaking, and implementation. The Council then provided its recommendation and supporting analyses to NMFS in late September. While NMFS was reviewing the Council's recommendations and preparing a proposed rule, the Northeast Fisheries Science Center (NEFSC) published new assessment information for both summer flounder and scup. These assessment updates presented different results regarding the status of both stocks from the information available to the Council in August. Specifically, the new assessments concluded that the 2012 specification recommendations from the Council could result in overfishing of summer flounder and scup, and that summer flounder could be subject to overfishing during 2011 if the catch approaches the established allowance for this year. The updated stock assessment did provide verification that the summer flounder stock was rebuilt in 2010, ending the rebuilding program that had been in place since 2000.

The SSC and Council met December 14, 2011, to reconsider the new assessment information and will provide revised recommendations to NMFS. The Council voted to recommend specifications based on the new summer flounder and scup assessment information at this meeting. The Council will be forwarding recommendations to NMFS to implement revised summer flounder and scup specifications. The exact timing and process for this resubmission of recommendations is unclear; however, it is clear that it would not be possible to implement the Council's revised specifications for summer flounder, scup, and black sea bass by the start of the 2012 fishing year on January 1.

In response to these complications that have impaired the normal timing and process, NMFS is implementing interim measures consistent with the new stock assessments to ensure specifications that prevent overfishing and that apply the best available science are in place on January 1, 2012. NMFS is soliciting comment on these interim measures and may adjust, as needed, the final 2012 specifications based on Council recommendations and public comment on the interim measures. NMFS notes that the Council recommendations from the December meeting were for the same summer flounder and scup ACLs and ACTs being implemented by this interim rule. The black sea bass measures of this interim rule are consistent with the Council's recommendations from its August 2011 meeting.

If NMFS had not implemented interim measures, no quotas for summer flounder, scup, or black sea bass would be in place on January 1, 2012. There are no quota rollover provisions for these species, so inaction would result in no quotas being in place for the start of the 2012 fishing year. This result would be inconsistent with the MSA, the FMP, the standing Court order, and would cause additional, substantial complications for all those involved in fishing for or managing summer flounder, scup, and black sea bass.

2012 Interim Specifications

NMFS developed these interim specifications for summer flounder and scup using the updated assessment information for both species and by applying the same calculations used by the SSC, Monitoring Committees, and the Council. Both species' stock assessments were categorized as Level 3 under the ABC Control Rules at 50 CFR 648.20. Assessments categorized at this level are judged by the SSC to over- or underestimate the accuracy of the Overfishing Limit (OFL). NMFS replicated the SSC's ABC derivation approach using an

assumed coefficient of variance of the Overfishing Limit (OFL) with a lognormal distribution of 100 percent. NMFS also determined the biomass ratio ($\text{biomass}(B)/B_{\text{MAXIMUM SUSTAINABLE YIELD (MSY)}}$) based on the 2012 stock projections, categorized both species as having a typical life history, and applied the Council's risk policy (P^* = risk of overfishing the stock) as described in § 648.21. These approaches are the same used by the SSC and Council. The Monitoring Committees did not recommend to the Council any reduction from the ACL to ACT to address management uncertainty for summer flounder and scup. NMFS also adopted this approach in deriving summer flounder and scup ACTs based on the updated stock assessment information. Thus, there is no offset between ACL and ACT to address management uncertainty in these interim specifications for summer flounder and scup. More detail is provided in the following sections.

Summer Flounder

The updated stock assessment OFL is 31,588,000 lb (14,328 mt). This amount represents a 28-percent reduction from the OFL of 43.89 million lb (19,908 mt) provided in the July 2011, stock projection information. The projected 2012 spawning stock biomass (SSB) is 134,667,008 lb (61,084 mt), above the SSB_{MSY} level of 132,440,000 lb (60,074 mt). Thus, the B/B_{MSY} ratio is 1.01. Applying the Council's risk policy results in an overfishing risk tolerance (P^*) of 0.40, or a 40-percent risk of overfishing the summer flounder stock. Using this information, the resulting ABC is 25,581,054 lb (11,603 mt), which is a 28-percent reduction from the Council's original recommendation submitted to NMFS in September, and a 25-percent reduction from the 2011 ABC. This ABC is 81 percent of the OFL (i.e., scientific uncertainty offset is a 19-percent reduction from OFL).

Consistent with § 648.102(a), for summer flounder, the sum of the recreational and commercial sector ACLs is equal to ABC. ACL is an expression of total catch (i.e., landings and dead discarded fish). To derive the ACLs, NMFS used the methods developed by the Council: The sum of the sector-specific estimated discards is removed from the ABC to derive the landing allowance. The resulting landing allowance is apportioned to the commercial and recreational sectors by applying the FMP allocation criteria: 60 percent to the commercial fishery and 40 percent to the recreational fishery. Using this method ensures that each sector is accountable for its respective discards, rather than simply apportioning the ABC by the allocation percentages to derive the sector ACLs. This means that the derived ACLs are not split exactly at 60/40; however, the landing portions of the ACLs do preserve the 60/40 allocation split, consistent with the FMP. The NMFS-derived commercial ACL is 14,002,000 lb (6,351 mt); the recreational ACL is 11,579,000 lb (5,252 mt).

As previously mentioned, NMFS is adopting the Council's recommended approach for 2012 and did not reduce ACT from the ACL for the interim summer flounder specifications. Thus, the sector ACTs are equal to the sector ACLs, and management uncertainty is assumed to be zero. The estimated sector-specific commercial discards for summer flounder total 459,000 lb (208 mt), which, when removed from the commercial ACT, results in a commercial quota of 13,136,000 lb (5,958 mt). Sector-specific recreational discards estimated for 2012 are 2,550,000 lb (1,157 mt), resulting in a recreational harvest limit (i.e., recreational landing quota) of 8,758,000 lb (3,973 mt). Consistent with the FMP and the Council's previous recommendation, up to 3 percent of the total landing allowances may be set aside for research; 3 percent of the recalculated landings in this interim rule is 677,128 lb (307 mt). This amount has been

preliminarily awarded through the grant award process for 2012.

As stated previously, the timing and change in information resulting from the updated stock assessments leaves no option except implementing interim measures to ensure some summer flounder catch constraints are in place at the start of the fishing year. The Council's previous catch quota recommendation for summer flounder was inconsistent with the MSA and FMP, as overfishing would result if those catch levels were fully attained in 2012. NMFS will review the Council's revised recommendation and public input on the interim measures, and may adjust the interim measures through a final rule in early 2012.

Table 1 presents the interim allocations of summer flounder by state with and without the commercial portion of the RSA deduction. Consistent with the revised quota setting procedures for the FMP (67 FR 6877, February 14, 2002), summer flounder overages are determined based upon landings for the period January-October 2011, plus any previously unaccounted for overages from January-December 2010. Table 1 summarizes, for each state, the commercial summer flounder percent shares as outlined in § 600.102(c)(1)(i), the resultant 2011 commercial quota (both initial and less the RSA), the quota overages as described above, and the final adjusted 2011 commercial quota, less the RSA. Delaware and New York both have overages requiring reduction of their 2012 state commercial quota allocations. For New York, the overage was from 2010 and not previously accounted for in the 2011 specifications rulemaking. The Delaware overage is explained in the next section.

TABLE 1. INTERIM STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2012

State	FMP Percent Share	Initial Commercial Quota		Initial Quota, less RSA		2011 Quota Overages (through 10/31/11)		Adjusted Quota, less RSA	
		lb	kg	lb	kg	lb	kg	lb	kg
ME	0.04756	6,247	2,834	6,054	2,746	0	0	6,054	2,746
NH	0.00046	60	27	59	27	0	0	59	27
MA	6.82046	895,936	406,396	868,226	393,827	0	0	868,226	393,827
RI	15.68298	2,060,116	934,469	1,996,400	905,567	0	0	1,996,400	905,567
CT	2.25708	296,490	134,488	287,320	130,328	0	0	287,320	130,328
NY	7.64699	1,004,509	455,645	973,441	441,553	50,736	23,014	922,705	418,539
NJ	16.72499	2,196,995	996,557	2,129,045	965,735	0	0	2,129,045	965,735
DE	0.01779	2,337	1,060	2,265	1,027	54,982	24,940	-52,717	-23,913
MD	2.03910	267,856	121,500	259,572	117,742	0	0	259,572	117,742
VA	21.31676	2,800,170	1,270,157	2,713,565	1,230,873	0	0	2,713,565	1,230,873
NC	27.44584	3,605,286	1,635,358	3,493,779	1,584,778	0	0	3,493,779	1,584,778
Total	100.00	13,136,001	5,958,490	12,729,724	5,774,203	105,718	47,954	12,676,724	5,750,162

Notes: 2011 quota overage is determined through comparison of landings for January through October 2011, plus any landings in 2010 in excess of the 2010 quota (that were not previously addressed in the 2011 specifications) for each state. For Delaware, this includes continued repayment of overharvest from previous years. Total quota is the sum for all states with an allocation. A state with a negative number has a 2012 allocation of zero (0). Kilograms are as converted from pounds and may not necessarily add due to rounding.

Delaware summer flounder closure. Table 1 indicates that, for Delaware, the amount of overharvest from previous years is greater than the amount of commercial quota allocated to Delaware for 2012. As a result, there is no quota available for 2012 in Delaware. The regulations at § 648.4(b) provide that Federal permit holders, as a condition of their permit, must not land summer flounder in any state that the Administrator, Northeast Region, NMFS, has determined no longer has commercial quota available for harvest. Therefore, effective January 1, 2012, landings of summer flounder in Delaware by vessels holding commercial Federal summer flounder permits are prohibited for the 2012 calendar year, unless additional quota becomes available through a quota transfer and is announced in the Federal Register. Federally permitted dealers are advised that they may not purchase summer flounder from federally permitted vessels that land in Delaware for the 2012 calendar year, unless additional quota becomes available through a transfer, as mentioned above.

Scup

The OFL for scup, as revised by the October assessment update, is 50.48 million lb (22,897 mt). This OFL is 23 percent lower than the 65.88-million-lb (29,883-mt) OFL the Council used as the foundation of its August 2011 scup specification recommendations to NMFS. The ABC calculated from the revised OFL using the SSC's Level 3 control rule and applying the Council's risk policy ($P^*=0.4$) is 40,879,639 lb (18,543 mt). This is also a 23-percent reduction from the Council's initial ABC recommendation of 53.35 million lb (24,199 mt).

The scup management measures at § 648.120(a) specify that ABC is equal to the sum of the commercial and recreational sector ACLs. The Council did not recommend any offset to address scup management uncertainty in either the commercial or recreational sectors. Under the

Council recommendation, the sector ACTs are equal to the ACLs. NMFS is adopting this approach in these interim specifications. Using the same derivation methods as the Council with the ABC based on the revised OFL, the commercial sector ACL/ACT is 31,887,000 lb (14,464 mt), and the recreational sector ACL/ACT is 8,994,000 lb (4,079 mt).

The Council recommended up to 3 percent of the landings for RSA. NMFS is applying the amount of RSA preliminarily identified in the grant award process, resulting in an RSA of up to 571,058 lb (259 mt). After RSA is removed, the interim commercial quota becomes 27,908,575 lb (12,659 mt), and the interim recreational harvest limit 8,446,367 lb (3,831 mt). Although these amounts are 82- and 96-percent increases from the 2011 commercial quota and recreational harvest limit, respectively; they are a reduction of 16 and 20 percent, respectively, from the 2012 quota and recreational limits recommended by the Council in August.

The scup commercial quota is divided into three commercial fishery quota periods. There were no previous commercial overages applicable to the 2012 scup commercial quota. The period quotas, after deducting for RSA are: Winter I (January-April)—45.11 percent, or 12.59 million lb (5,711 mt); Summer (May-October)—38.95 percent, 10.87 million lb (4,931 mt); and Winter II (November-December)—15.94 percent, 4.45 million lb (2,018 mt). Unused Winter I quota is carried over for use in the Winter II period. Based on the recommendation of the Council, NMFS is also increasing the Winter I possession limit from 30,000 lb (13,608 kg) to 50,000 lb (22,680 kg) per trip.

TABLE 2. INTERIM COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2012 BY QUOTA PERIOD

		Commercial Annual Catch Limit		Estimated Discards		Initial Quota		Initial Quota less Overages (through 10/31/2009)		Adjusted Quota less Overages and RSA		Federal Possession Limits (Per Trip)	
Quota Period	Percent Share	Lb	mt	Lb	mt	lb	mt	lb	mt	lb	mt	lb	kg
Winter I	45.11	14,384,226	6,525	1,593,736	723	12,790,489	5,802	N/A	N/A	12,589,558	5,711	50,000	22,680
Summer	38.95	12,419,987	5,634	1,376,104	624	11,043,883	5,009	N/A	N/A	10,870,390	4,931	N/A	N/A
Winter II	15.94	5,082,788	2,306	563,160	255	4,519,628	2,050	N/A	N/A	4,448,627	2,018	2,000	907
Total	100.0	31,887,000	14,464	3,533,000	1,603	28,354,000	12,861	N/A	N/A	27,908,575	12,659	N/A	N/A

Notes: The Winter I possession limit will drop to 1,000 lb (454 kg) upon attainment of 80 percent of that period's allocation. The Winter II possession limit may be adjusted (in association with a transfer of unused Winter I quota to the Winter II period) via notification in the [Federal Register](#). Metric tons are as converted from pounds and may not necessarily add due to rounding. N/A=Not applicable.

Consistent with the unused Winter I commercial scup quota rollover provisions at § 648.122(d), this rule maintains the Winter II possession limit-to-rollover amount ratios that have been in place since the 2007 fishing year, as shown in Table 3. The Winter II possession limit will increase by 1,500 lb (680 kg) for each 500,000 lb (227 mt) of unused Winter I period quota transferred, up to a maximum possession limit of 8,000 lb (3,629 kg).

TABLE 3. POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD

Initial Winter II Possession Limit		Rollover from Winter I to Winter II		Increase in Initial Winter II Possession Limit		Winter II Possession Limit after Rollover from Winter I to Winter II	
lb	kg	lb	mt	lb	kg	lb	kg
2,000	907	0-499,999	0-227	0	0	2,000	907
2,000	907	500,000-999,999	227-454	1,500	680	3,500	1,588
2,000	907	1,000,000-1,499,999	454-680	3,000	1,361	5,000	2,268
2,000	907	1,500,000-1,999,999	680-907	4,500	2,041	6,500	2,948
2,000	907	2,000,000-2,500,000	907-1,134	6,000	2,722	8,000	3,629

Black Sea Bass

This interim rule implements the Council’s recommended measures for black sea bass: An ABC of 4.5 million lb (2,041 mt). The black sea bass stock remains a Level 4 stock for ABC calculation purposes. The SSC rejected the OFL estimate provided from the stock assessment, stating that it was highly uncertain and not sufficiently reliable to use as the basis of management

advice. This ABC is the status quo.

The Council recommends and NMFS is implementing a commercial ACL and ACT of 1,980,000 lb (898 mt). For the recreational fishery, the Council recommends a 26-percent reduction from ACL to the ACT designed to mitigate uncertainty in recreational black sea bass discards. Analyses from the Black Sea Bass Monitoring Committee indicate that the post-season, actual recreational discards have often been higher than the projections available prior to the fishing year. If this trend occurs in 2012, the ACL would likely be exceeded if the ACT was set equal to ACL. Accordingly, the Council recommends an ACL of 2,520,000 lb (1,143 mt) and an ACT of 1,860,000 lb (844 mt) to mitigate the potential that the recreational sector ACL will be exceeded in 2012.

Removing discards from the ACTs produces the total landings allowed from the 2012 black sea bass fishery. The Council recommends up to 3 percent of the landings as RSA which equals 92,600 lb (42 mt). This amount has preliminarily been awarded through the grant award process for 2012. When RSA is removed, the remaining available landings are the recreational harvest limit of 1.32 million lb (598 mt) and commercial quota of 1.71 million lb (774 mt). There are no prior year commercial black sea bass overages that require adjustment of the interim commercial quota for 2012. NMFS is implementing these recommendations as the interim measures for the 2012 black sea bass fishery.

Explanation of RSA and Exempted Fishing Permit (EFP) Requests for Public Comment

In 2001, NMFS implemented Framework Adjustment 1 to the FMP to allow up to 3 percent of the Total Allowable Landings (TAL) for each species to be set aside each year in support of scientific research. For the 2012 fishing year, NMFS solicited research proposals for

the Mid-Atlantic RSA program through a Federal Funding Opportunity announcement published on January 6, 2011.

The project selection and award process has not concluded; however, three projects have been preliminarily selected for approval by the NEFSC.

These projects have collectively requested 689,932 lb (312,948 kg) of summer flounder, 509,160 lb (230,951 kg) of scup, 184,280 (83,588 kg) of black sea bass, 250,580 lb (113,661 kg) of longfin squid, 200,000 lb (90,718 kg) of butterfish, and 200,000 lb (90,718 kg) of bluefish. Project awards are pending a review by the NOAA Grants Office. If any portion of the RSA quota is not awarded, NMFS will notify the public and return the unissued amount to the general fishery either through the specification rule or through the publication of a separate notice in the Federal Register.

These interim specifications include a brief description of the preliminarily selected 2012 Mid-Atlantic RSA projects, including a description of applicable summer flounder, scup, and black sea bass regulation exemptions that will likely be required to conduct the proposed research and compensation fishing. The MSA requires that interested parties be provided an opportunity to comment on all proposed EFPs. Persons interested in commenting on the proposed exemptions should provide their comments through any of the methods described in the ADDRESSES section of this rule.

EFPs are issued to enable research and/or compensation fishing activities. Compensation fishing EFPs are issued to all projects. Vessels harvesting RSA quota on compensation fishing trips in support of approved research projects would be issued EFPs authorizing them to exceed applicable Federal possession limits and to fish during Federal quota closures. These exemptions

allow project investigators to recover research expenses, as well as adequately compensate fishing industry participants harvesting RSA quota. Vessels harvesting RSA quota would operate within all other regulations that govern the commercial and recreational fisheries, unless otherwise exempted through a separate EFP. The harvest of RSA quota would occur January 1-December 31, 2012, by vessels conducting research and/or compensation fishing.

The need for research EFPs depends on the nature of the research activity and whether the activity conflicts with fishing regulations. Not all projects need an EFP to conduct the research.

Project 1 Description. The proposed project is the continuation of a scup survey of 10 hard-bottom sites in Southern New England (SNE) that are not sampled by current state and Federal finfish trawl surveys. Unvented fish pots would be fished on each site from June through October in coastal waters of Nantucket Sound, Martha's Vineyard Sound, and Buzzard's Bay, MA; and Rhode Island Sound, RI. The length frequency distribution of the catch would be compared statistically to each of the other collection sites, and to finfish trawl data collected by NMFS and state agencies to gain greater understanding of the scup stock structure.

Research Vessel Exemptions. Research vessels for Project 1 would require an EFP exempting them from minimum scup and black sea bass pot vent size requirements to ensure that scup length frequency data are representative and not biased. If a participating vessel holds a Federal lobster permit, it would need exemption from lobster pot vent size requirements, as well. Exemption from scup and black sea bass closures and time restrictions would be needed to ensure the survey is not disrupted by such regulations. Exemption from scup and black sea bass minimum fish sizes and possession limits would also be needed for data collection purposes

only. All undersized fish would be discarded as soon as practicable to minimize mortality, and fish in excess of possession limits would either be discarded as soon as practicable or landed as RSA quota.

Compensation Vessel Exemptions. Vessels harvesting RSA quota would require exemptions for fishery closures and possession limits to facilitate compensation fishing activities.

Project 2 Description. The proposed project is a black sea bass survey of sites in SNE and Mid-Atlantic waters. Unvented black sea bass pots would be fished on each site, with one in Massachusetts, one south of Rhode Island, one south of New Jersey, and one south of Virginia, for 5 months, running from June through October in SNE, and April through August in the Mid-Atlantic. The project is designed to collect black sea bass from sites that are not sampled by current state and Federal finfish bottom trawl surveys. The length frequency distribution of the catch would be compared statistically to each of the other collection sites, and to finfish trawl data collected by NMFS and state agencies to gain greater understanding of the black sea bass stock structure.

Research Vessel Exemptions. Research vessels for Project 2 would require an EFP exempting them from minimum scup and black sea bass pot vent size requirements to ensure that black sea bass length frequency data are representative and not biased. If a participating vessel holds a Federal lobster permit, it would need to be exempted from lobster pot vent size requirements, as well. Exemption from scup and black sea bass closures and time restrictions would be needed to ensure the survey is not disrupted by such regulations. Exemption from scup and black sea bass minimum fish sizes and possession limits would also be needed for data

collection purposes only. All undersized fish would be discarded as soon as practicable to minimize mortality, and fish in excess of possession limits would either be discarded as soon as practicable or landed as RSA quota.

Compensation Vessel Exemptions. Vessels harvesting RSA quota for Project 2 would require exemptions from fishery closures and possession limits to facilitate compensation fishing activities.

Project 3 Description. The proposed project would continue a spring and fall trawl survey in shallow waters between Martha's Vineyard, MA, and Cape Hatteras, NC, that are not sampled by the NMFS trawl survey. The project investigators plan to provide stock assessment data for Mid-Atlantic RSA species, including summer flounder, scup, black sea bass, longfin squid, butterfish, and Atlantic bluefish, and assessment-quality data for weakfish, Atlantic croaker, spot, several skate and ray species, smooth dogfish, horseshoe crab, and several unmanaged but important forage species.

Research Vessel Exemptions. Vessels conducting this near-shore trawl survey would not require any exemptions from regulations implemented under the Summer Flounder, Scup, and Black Sea Bass FMP.

Compensation Vessel Exemptions. Vessels harvesting RSA quota for Project 3 would require the exemptions from fishery closures and possession limits to facilitate compensation fishing activities.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this interim rule is consistent with the Summer Flounder,

Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator finds good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest.

The timing of the normal specification process has been interrupted by the introduction of new stock status information provided by the NEFSC for summer flounder and scup. Under the MSA, NMFS and the Council must respond to this information to ensure these two stocks are not subject to overfishing in 2012. It is essential that some catch restrictions be established and put in place by January 1, 2012. These restrictions would not only control landings so that overfishing does not occur, but would allow the agency to comply with a longstanding Court order (see North Carolina Fisheries Assoc. Inc. et al. v. Daley Civil NO. 2:97cv339 (RGD)), which compels NMFS to put in place annual quotas within a reasonable period of time, which NMFS has satisfied by publishing such quotas on or before January 1 of each year. The FMP does not provide any year-to-year quota rollover. Thus, if NMFS took no action 2011 to set the 2012 summer flounder and scup quotas, there would be no catch constraints on those fisheries when the 2012 fishing year begins. This result would be inconsistent with the MSA, the FMP, and the Court order.

Normally, the Council decides on its summer flounder and scup specification recommendations in August and provides its analytical documentation in support of those recommendations to NMFS in September. NMFS reviews the recommendations and analyses for consistency with applicable law and other requirements, and then conducts notice-and-

comment rulemaking over the course of October, November, and early December. The process typically culminates in a final rule to implement specifications in December. Even under ideal circumstances, the rulemaking associated with a typical specification process from Council decision to agency rulemaking usually requires NMFS to waive the 30-day delay in effectiveness to ensure these management measures are in place by January 1.

The introduction of new summer flounder and scup stock status information in late October presents a substantial complication in the specification process. The Council and NMFS are obligated by the MSA and National Standard 2 to utilize the best available scientific information in fisheries management. The updated stock status information for both species indicates that the Council's previous specification recommendations would result in overfishing both stocks in 2012. Under the MSA, NMFS may not authorize a level of catch that would knowingly result in overfishing a stock; thus, it would not be appropriate to implement the Council's initial specification recommendations for these two species. Nor would it be appropriate to maintain the status quo, as the 2011 catch levels would also be too high and would require rulemaking to maintain (i.e., they cannot be automatically carried over year-to-year).

Following the release of the new information in late October, there was insufficient time for the Council to convene its collective committees and its full membership to consider the new information and reconsider its recommendation to NMFS. Announcement of Council and Council committee meetings are required to provide specific advance notice in the Federal Register. Here, even had the Council been able to convene quickly and provide NMFS revised recommendations for summer flounder and scup sufficient to ensure that overfishing would not occur in 2012, there would have been insufficient time for NMFS to review the

recommendations and to conduct notice-and-comment rulemaking with an effective date on or before January 1, 2012. This is true even if an abbreviated public comment period and waiver of the 30-day delay in effectiveness were used by NMFS.

The Council proposed revised recommendations for summer flounder and scup during its December 13-15, 2011, meeting. NMFS is soliciting public comment on the interim measures contained in this rule and will issue final measures, if necessary, as soon as possible in early 2012 that respond to both the Council's revised recommendation and comments received on the interim measures.

While this procedure is not completely comparable to the notice-and-comment process typically used, NMFS views this as the only tenable solution to implement measures that ensure overfishing does not occur. This process will ensure that appropriate measures are implemented for the start of the fishing year and provides a meaningful way for the public to comment on those measures as part of the development process for final measures. NMFS recognizes this is not ideal; however, for the unforeseeable reasons outlined above, it would be impracticable to conduct standard notice-and-comment rulemaking for the 2012 specifications, and failing to implement them would undermine the intent of the MSA, and prevent NMFS from undertaking its legal duties. The delay that would result from doing so would allow the fishery to begin with no effective catch constraints in place and would violate the MSA, the FMP, and introduce significant complications in the fishery management program. While less than ideal, the alternative of putting in measures through an interim rule at least ensures that catch constraints are in place at the start of the fishing year and provides a process for public input on final measures to be implemented at a later date.

The Assistant Administrator further finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for the reasons outlined above. These specifications must be in place on January 1, 2012, to ensure catch constraints are in place for the start of the fishing year.

These interim specifications are exempt from review under Executive Order 12866.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., are inapplicable.

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

Dated: December 22, 2011

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

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