



**Billing Code 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 170808738-7777-01]**

**RIN 0648-BH11**

**Magnuson-Stevens Fishery Conservation and Management Act Provisions;**

**Fisheries of the Northeastern United States; Northeast Groundfish Fishery; Fishing**

**Year 2017; Extension of Emergency Removal of Southern Windowpane**

**Accountability Measures**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; emergency action extended.

**SUMMARY:** This rule extends the emergency action to remove the 2017 southern windowpane flounder accountability measures (AM) for non-groundfish trawl vessels.

The rule is necessary because the emergency measures would otherwise expire before the end of the 2017 fishing year. This rule is intended to mitigate negative economic impacts to non-groundfish vessels, while maintaining conservation benefits for the southern windowpane flounder stock.

**DATES:** Effective March 1, 2018, through April 30, 2018.

**ADDRESSES:** Copies of recent related actions, including Framework 52, 55, and Framework 56, the Environmental Assessments (EA), and their Regulatory Impact Review, and the Final Regulatory Flexibility Act analysis prepared by the New England

Fishery Management Council and NMFS are available from Michael Pentony, Regional Administrator, NMFS Greater Atlantic Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. The documents are also accessible via the Internet at:

*<https://www.nefmc.org/management-plans/northeast-multispecies>*.

**FOR FURTHER INFORMATION CONTACT:** Sarah Heil, Senior Fishery Policy Analyst, phone: 978-281-9257.

**SUPPLEMENTARY INFORMATION:**

On September 1, 2017, we implemented emergency measures to remove the southern windowpane flounder AMs for non-groundfish trawl vessels (82 FR 41564). These emergency measures expire on February 28, 2018. The emergency rule published on September 1, 2017, included detailed information on the background, reasons, and justification for the emergency measures, and this information is not repeated here.

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) limits NMFS' emergency action authority to an initial period of 180 days, with a potential extension up to an additional 186 days, if certain criteria are met. An extension is allowed if the public has had an opportunity to comment on the emergency regulation, and in the case of a Council recommendation for an emergency action, the Council is actively developing a change to the Fishery Management Plan (FMP) or regulations to address the emergency on a permanent basis. We accepted public comment on the emergency measures, and received one comment in support of the action. Additionally, the New England Fishery Management Council developed changes in Framework Adjustment 57 to the Northeast Multispecies (Groundfish) FMP to permanently address the emergency. Framework 57 is intended to be implemented for

the 2018 fishing year beginning on May 1, 2018. As discussed in more detail below, we determined the necessary criteria to extend the emergency measures have been met.

Therefore, this temporary rule removes the southern windowpane flounder AMs for non-groundfish trawl vessels for the remainder of the 2017 fishing year through April 30, 2018.

### **Background**

On August 1, 2017, we implemented AMs because the 2015 total annual catch limit (ACL) for southern windowpane flounder was exceeded (82 FR 35660). Due to data availability, we typically implement AMs for windowpane flounder at the start of the second fishing year after an overage. These AMs require trawl vessels fishing in certain Southern New England areas to use selective gear that limit flatfish catch. The southern windowpane AM areas apply to all groundfish trawl vessels. The AM areas also apply to non-groundfish trawl vessels fishing with a 5 inch (12.7 centimeter) or greater codend mesh size, which includes vessels that target summer flounder, scup, black sea bass, and skates. The AMs impose a substantial financial hardship on both groundfish and non-groundfish vessels, particularly because the AM areas eliminate access to target species that vessels are unlikely to recoup even if they move to fish in other areas. These AMs are estimated to result in \$2 million in lost revenue in catch of yellowtail flounder, winter flounder, summer flounder, and scup.

In 2015, we implemented Framework Adjustment 52 to the Northeast Multispecies FMP to reduce the economic impacts of the windowpane flounder AMs for the groundfish fishery (80 FR 2021; January 15, 2015). At the time, the AMs had only been triggered for the groundfish fishery. The Council intentionally limited the scope of

Framework 52 to the groundfish fishery to ensure the action could be completed and implemented during the 2015 fishing year. Framework 52 gave the Regional Administrator authority to remove the windowpane flounder AM in-season if catch is below the ACL in the year immediately following the overage. For example, if we implement an AM in year 3 (2017) due to an overage in year 1 (2015), we can remove the AM in September if catch did not exceed the ACL in year 2 (2016).

Total 2016 catch of southern windowpane flounder was 82 percent of the total ACL. As a result, under the Regional Administrator authority that Framework 52 established, we removed the AMs for the groundfish fishery on September 1, 2017 (82 FR 35676; August 1, 2017). However, because this authority is limited to the groundfish fishery only, the AMs for non-groundfish trawl vessels would have remained in place for the entire 2017 fishing year without additional action.

As a result of the 2015 ACL overage, we implemented the AMs for non-groundfish trawl vessels for the first time in 2017. Neither we, nor the New England Council, considered or foresaw the possibility of removing the AMs in-season for groundfish vessels, but maintaining them for non-groundfish trawl vessels despite catch being below the ACL. This situation presented an issue of fairness and equity, particularly because catch by non-groundfish vessels was well below the sub-ACL for this fishery component. Maintaining the AMs for non-groundfish trawl vessels for the full fishing year would have substantial economic impacts without further contributing to the conservation goals of the AMs. For these reasons, and at the request of the New England and Mid-Atlantic Councils, on September 1, 2017, we implemented an emergency rule to remove the 2017 southern windowpane flounder AMs for non-

groundfish trawl vessels (82 FR 41564). These emergency measures expire on February 28, 2018.

### **Extension of Emergency Measures**

If the emergency measures expire, the southern windowpane flounder AMs would be re-implemented for non-groundfish trawl vessels for the remainder of the 2017 fishing year. This would undermine the conservation and management goals of the September 1, 2017, emergency action. AMs are intended to correct operational issues that cause overages and mitigate biological consequences of overages. The fishery's 2016 catch was below the overall ACL, which is consistent with the fishery having corrected the operational issues that caused the 2015 overage. We expect 2017 catch to be similar to 2016 because of recent quota reductions for key flounder species that limit overall fishing effort on all flatfish stocks, including southern windowpane flounder. Additionally, the 2017 assessment update shows a stable and slightly increasing southern windowpane stock. This assessment information, along with 2016 catch, is consistent with the AM's goal of mitigating or addressing the effects of the overage. As a result, we determined that removing the AMs in September would not result in negative impacts for the stock. Thus, allowing the emergency measures to expire would result in unnecessary economic loss to non-groundfish trawl vessels.

Additionally, as noted earlier in this preamble, emergency action was justified because new information presented an issue of fairness and equity that we, nor the Council, previously contemplated. At the time of the emergency action, the New England Council was developing Framework Adjustment 57 to the Northeast Multispecies FMP, in part to address the issue of southern windowpane flounder AM

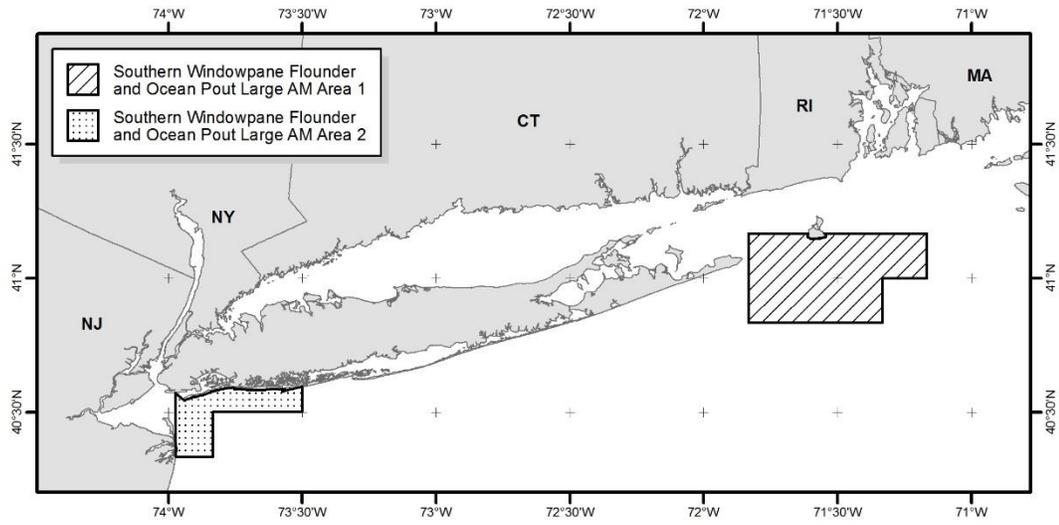
impacts on non-groundfish trawls that arose during 2017. In this action, the New England Council recommended giving the Regional Administrator authority to remove the AMs inseason for non-groundfish vessels. The New England Council also recommended revising the southern windowpane flounder AM areas. These measures are intended to provide non-groundfish trawl vessels additional flexibility while continuing to reduce impacts on southern windowpane flounder. Framework 57 is intended to be implemented for the 2018 fishing year. The New England Council took final action on Framework 57 in December 2017, and has submitted the action to us for review. Framework 57 could not be developed and implemented in time to address this issue for the 2017 fishing year. Extending the emergency measures for the remainder of this fishing year will prevent disruption to non-groundfish trawl vessels while we consider the New England Council's recommended permanent changes.

### **Emergency Measures**

This emergency action extends the Regional Administrator authority to remove the southern windowpane flounder AM inseason for non-groundfish trawl vessels if we determine that catch is below the ACL in the year immediately following an overage. Effective March 1, 2018, this action removes the southern windowpane flounder AMs for non-groundfish trawl vessels fishing with 5 inches (12.7 centimeter) or greater codend mesh size. These emergency measures are effective through April 30, 2018. There will be no southern windowpane flounder AM in effect beginning on May 1, 2018, because the 2016 ACL was not exceeded and current 2017 catch information does not suggest an ACL overage will occur. Non-groundfish trawl vessels may fish inside the southern windowpane flounder AM areas (Figure 1) without selective gear, which increases

fishing opportunities to target other flatfish species for which they hold a permit and for which quota is available.

**Figure 1. Southern Windowpane Flounder Accountability Measure Areas.**



## **Comments and Responses**

We received one comment during the comment period on the emergency rule.

*Comment 1:* Lund's Fisheries, Inc. commented in support of the emergency measures, and agreed that maintaining the AMs for non-groundfish trawl vessels would have presented fairness and equity issues, as well as serious economic impacts, without contributing to conservation goals of the AMs.

*Response:* We agree. For all of the reasons described in detail in the initial emergency rule, as well as those reasons in the preamble above, allowing the emergency measures to expire before the end of the fishing year would undermine the goals of the emergency action. As a result, this rule extends the emergency measures for the remainder of the 2017 fishing year to prevent disruption to Mid-Atlantic trawl vessels in the middle of the fishing year, maintain fairness and equity, and continue to mitigate the negative economic impacts on these vessels that the AMs would otherwise impose.

## **Classification**

The NMFS Assistant Administrator has determined that this extension to the emergency rule is consistent with the criteria and justifications for use of emergency measures in section 305(c) of the Magnuson-Stevens Act, and is consistent with the Northeast Multispecies FMP, other provisions of the Magnuson-Stevens Act, the Administrative Procedure Act (APA), and other applicable law.

Section 553 of the APA establishes procedural requirements applicable to rulemaking by Federal agencies. The purpose of these requirements is to ensure public access to the Federal rulemaking process and to give the public adequate notice and

opportunity for comment. Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries finds good cause to waive prior notice and the opportunity for public comment because it would be impracticable and contrary to the public interest and would prevent the positive benefits this rule is intended to provide. Additionally, because this rule relieves a restriction and removes the southern windowpane flounder AM areas for non-groundfish trawl vessels, it is not subject to the 30-day delayed effectiveness provision of the APA under 5 U.S.C. 553(d)(1).

Without additional action, the emergency measures implemented on September 1, 2017, to remove the AMs for non-groundfish vessels would expire before the end of the 2017 fishing year. Implementing the AMs only for non-groundfish trawl vessels would present fairness and equity issues. The AMs would also have substantial economic impacts without contributing further to the conservation goals of the AMs. The AM areas eliminate access to target species that vessels are unlikely to recoup even if they move to fish in other areas. Thus, extending the emergency measures to remove the AMs for the remainder of the 2017 fishing year continues to mitigate serious economic harm to affected vessels until permanent measures can be implemented. There are less than 3 months remaining in the 2017 fishing year. The time necessary to provide prior notice and an opportunity for public comment would allow the emergency measures to expire, and prevent this action from being implemented before the end of the fishing year.

Additionally, the original emergency rule provided for public comment on the emergency measures. The Council also addressed this issue in Framework 57 to the Northeast Multispecies FMP, which is scheduled for implementation for the 2018 fishing year beginning on May 1, 2018. During the development of Framework 57, there was

extensive public comment on potential changes to the windowpane flounder AMs. Thus, prior notice and opportunity for public comment for this rule would not provide added benefit that would outweigh the need to avoid unnecessary economic harm on non-groundfish trawl vessels fishing in Southern New England.

This action is being taken pursuant to the emergency provision of the Magnuson-Stevens Act and is exempt from Office of Management and Budget review.

This emergency rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: February 21, 2018.

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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 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 § 648.90, add paragraph (a)(5)(i)(D)(I)(iii) effective March 1, 2018, through April 30, 2018.

The addition reads as follows:

**§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.**

(a) \* \* \*

(5) \* \* \*

(i) \* \* \*

(D) \* \* \*

(I) \* \* \*

*(iii) Emergency rule reducing the duration of southern windowpane flounder AM for non-groundfish vessels.* Effective March 1, 2018, through April 30, 2018, the southern windowpane flounder AM is removed for all vessels fishing with trawl gear with a codend mesh size equal to or greater than 5 inches (12.7 cm) in other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3).

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