

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

[Docket No. 971015246-7293-02; I.D. 051498C]

**Fisheries of the Northeastern United States; Scup Fisheries; Rescission of 1998 Summer Period Scup Fisheries Closures in Delaware, New Hampshire, Maryland, and Massachusetts**

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

**ACTION:** Rescission of closures.

**SUMMARY:** NMFS issues this notification announcing the rescission of closures previously issued for the Delaware, New Hampshire, Massachusetts, and Maryland Summer period scup fisheries for 1998. This rescission is in compliance with an April 27, 1998, Order of the United States District Court for Massachusetts (Court), which voided state-by-state allocation of the Summer period commercial scup fishing quota. The public is advised that landings are allowed for the Summer period in Delaware, New Hampshire, Maryland, and Massachusetts and that the quota is being administered on a coastwide basis.

**DATES:** Effective May 18, 1998.

**FOR FURTHER INFORMATION CONTACT:** Regina L. Spallone, Fishery Policy Analyst, 978-281-9221.

**SUPPLEMENTARY INFORMATION:** NMFS, in compliance with regulations found at 50 CFR 648.120, closed the 1998 scup Summer period commercial fisheries of Delaware and New Hampshire (62 FR 66304, December 18, 1997), Massachusetts (63 FR 3478, January 23, 1998), and Maryland (63 FR 23227, April 28, 1998) after determining through quota adjustments that these States had used their entire available Summer period commercial scup quota. These closures were to be effective May 1, 1998, through October 31, 1998.

In response to a lawsuit filed by the Commonwealth of Massachusetts, the Court, on April 27, 1998, ordered that the state-by-state allocation system for the summer commercial scup fishery, as codified in 50 CFR 648.120, is void. Since the state closures were triggered by the state-by-state allocation system required under 50 CFR 648.120, the basis for closing these fisheries is removed, and the closures are rescinded. The 1998 Summer period quota of 1,780,794 lb (807,755 kg) will be administered on a coastwide basis.

## Classification

This action is required by 50 CFR part 648 and is exempt from review under E.O. 12866.

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

Dated: May 15, 1998.

**Gary C. Matlock,**

*Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

[Docket No. 09-302051-8119-02; I.D. 021198B]

RIN 0648-AK78

**Fisheries of the Northeastern United States; Fishery Management Plan (FMP) for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Recreational Measures for the 1998 Summer Flounder, Scup, and Black Sea Bass Fisheries**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to amend the regulations implementing the FMP for the Summer Flounder, Scup, and Black Sea Bass Fisheries. This rule implements a possession limit of eight fish per person and a minimum fish size of 15 inches (38 cm) for the 1998 summer flounder recreational fishery; a minimum fish size of 10 inches (25.4 cm) and an August 1 through August 15 seasonal closure for the 1998 black sea bass recreational fishery; and no change in the current regulations for the 1998 scup recreational fishery. The intent of this rule is to comply with the regulations implementing the FMP for the fisheries that require NMFS to implement measures for the upcoming fishing year that will prevent overfishing of these resources.

**DATES:** Effective June 22, 1998.

**ADDRESSES:** Copies of the Environmental Assessment prepared for the 1998 summer flounder, scup, and black sea bass specifications and supporting documents used by the Monitoring Committee are available from: Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 S. New Street, Dover, DE 19901-6790.

## FOR FURTHER INFORMATION CONTACT:

David M. Gouveia, Fishery Management Specialist, (978) 281-9280.

**SUPPLEMENTARY INFORMATION:** The FMP was developed jointly by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission), in consultation with the New England and South Atlantic Fishery Management Councils. Implementing regulations for the fishery are found at 50 CFR part 648.

Sections 648.100, 648.120, and 648.140 outline the process for determining annual commercial and recreational catch quotas and other restrictions for the summer flounder, scup, and black sea bass fisheries. Pursuant to these sections, the Administrator, Northeast Region, NMFS, implements measures for the fishing year to ensure achievement of the fishing mortality rate specified in the FMP. This document announces the following measures pertaining to the recreational fishery, which are unchanged from the proposed measures that were published in the **Federal Register** on March 17, 1998 (63 FR 13208): (1) An individual possession limit of eight fish per person and a minimum fish size of 15 inches (38 cm) for the 1998 summer flounder recreational fishery; (2) a minimum fish size of 10 inches (25.4 cm) and an August 1 through August 15 seasonal closure for the 1998 black sea bass recreational fishery; and (3) no-change in the current regulations for the 1998 scup recreational fishery (a minimum fish size of 7 inches (17.78 cm)). The preamble to the proposed rule provided background concerning the development of these measures and that information is not repeated here.

In addition to these measures, the Council and Commission considered measures to reduce discard mortality associated with the recreational fishery. Discard mortality was addressed for the commercial fishery by requiring each state to establish a 15 percent commercial quota set aside for a bycatch fishery. The Council intended to recommend a recreational hook requirement to address discard mortality in that sector.

However, Commission staff presented the results of a literature review that revealed few available studies available on which to base hook size requirements for summer flounder. Therefore, the Council and Commission took action based on the limited studies available and testimony from fishery participants. During the 1998 fishery,

the Council and Commission intend to publicize their support for the voluntary use of circle hooks greater than 2/0 in size when fishing for summer flounder. Given the absence of definitive data, this appears to be a reasonable way to begin to address this issue for the recreational fishery.

#### Comments and Responses

Two comments were received immediately after the Council meeting in December 1997. One comment was received during the comment period for the proposed rule, which ended April 16, 1998.

*Comment 1:* New Jersey Congressman Frank Pallone supports a 14.5-inch (36.8-cm) minimum fish size, eight fish per person possession limit, and a May 15 to October 15 open season for summer flounder; and a 9.5-inch (24.1-cm) minimum fish size and a "reasonable seasonal restriction" for black sea bass. Congressman Pallone feels that the proposed summer flounder and black sea bass recreational specifications will have a greater negative impact on the New York and New Jersey area than on any other area in the Mid-Atlantic region.

*Response:* NMFS notes that the FMP calls for substantial reductions in commercial and recreational harvests of both summer flounder and black sea bass coastwide in 1998. Summer flounder measures are intended to achieve a 20.2-percent reduction from 1997 catches. The Congressman proposed a less restrictive minimum fish size for summer flounder than those recommended by the Council and published in the proposed rule. The seasonal closure supported by the Congressman appears to be intended to provide the additional reductions in catch required for 1998. NMFS notes that the Council had an extended discussion about including a closed season in the recreational measures for summer flounder for 1998. That discussion identified several concerns that are unresolved by the Congressman's proposal.

First, the seasonal restriction would require the fishery to be closed from January 1 through May 14, as well as from October 16 through December 31. However, this final rule will not be published until April or May. Therefore, the first portion of the Congressman's proposed closed season could not be implemented for 1998. Second, because summer flounder migrate seasonally, it is difficult to specify a closed season that will achieve a consistent reduction throughout the geographic range of the species. The Council discussed closed seasons at length and several Council

members expressed concern that closures in either spring or fall would have disproportionate negative impacts upon such southern states as Virginia and North Carolina. There is no evidence that any particular state will be affected disproportionately.

The 1998 black sea bass measures are intended to achieve landings that are a 47-percent reduction from those in 1996 (the last year for which complete landings are available). The Congressman supports a 9.5-inch (24.1-cm) minimum fish size with a "reasonable seasonal restriction." Since the minimum fish size supported by the Congressman is less restrictive than that adopted here, the seasonal restriction would have to be more restrictive in order to meet the reduction necessary. At the December 1997 Council meeting, Council members and the public in attendance focused on three potential management tools available for managing the black sea bass fishery: an individual possession limit, minimum fish size, and seasonal restrictions. In that discussion, as well as in the recommendations of the Monitoring Committee, of the Industry Advisors and, ultimately, of the Council, consensus was that an increase to a 10-inch (25.4-cm) minimum fish size and a 15-day closure was preferable to restrictive possession limits or additional seasonal restrictions. In fact, the Council's Industry Advisors noted that they had agreed that a 10-inch (25.4-cm) size limit would have fewer negative effects than any other potential management measures on all user groups. The Congressman did not explain why he preferred a 9.5-inch (24.1-cm) minimum fish size to a 10-inch (25.4-cm) minimum fish size or what he would consider a "reasonable" seasonal closure.

Finally, the Congressman noted that the proposed measures will have a more severe impact upon fishery participants in New York and New Jersey than in any other states. NMFS recognizes that the recreational fishery is important to these states, but is not convinced that this conclusion is supported. In fact, during the Council discussion, several members noted concern that the increase in the summer flounder minimum fish size would be more restrictive in such southern states as Virginia and North Carolina than in the northern portions of the management area. NMFS concludes that specific measures may have somewhat different impacts geographically, but, overall, NMFS determined that the rule would not have a significant impact upon a substantial number of small entities, which would affect New York and New

Jersey disproportionately (see **Classification** section).

*Comment 2:* The State of Maryland Department of Natural Resources (DNR) commented in support of the initial Council proposal, which would allow states to implement a 14.5-inch (36.8-cm) minimum fish size and six fish per person possession limit, and closed season as long as it achieves the same conservation benefit as the 15-inch (38-cm) minimum fish size and the eight fish per person possession limit. DNR expressed serious concern that a minimum fish size of 15 inches (38 cm) would have the effect of denying Maryland harvesters the opportunity to catch legal summer flounder in Chesapeake Bay and, to some extent in other coastal bays.

*Response:* The FMP does not allow the Council to specify alternative possession limits or minimum fish sizes. At the time the Council made its recommendation, the members specified that, if alternative measures were not allowed, the preferred measure would be the 15-inch (38-cm) minimum fish size and eight fish per person possession limit. It will be necessary to amend the FMP to establish a measure that will allow the Council to specify a set of alternative measures with equivalent conservation benefits from which states may select the set of measures that are most appropriate for their fisheries. NMFS understands that the Council intends to discuss this issue further as part of a future amendment to the FMP.

Recreational survey data suggests that, while the percentage of fish greater than or equal to 15 inches (38 cm) in size in the Chesapeake Bay may be a lower percentage than that in the coast as a whole (60 percent), there are larger fish present in the Bay.

*Comment 3:* One commenter supported raising the black sea bass minimum size limit to 10 inches (25.4 cm), but has expressed concern regarding the lack of a possession limit and the August 1 through August 15 seasonal closure. The commenter supports a possession limit of 30 fish per person for "full day" vessels and 20 fish per person for "half day" vessels in the Ocean City, Maryland, area. To accommodate the vessels that make trips longer than 12 hours, the commenter suggests a possession limit of 50 fish per person and a possession limit of 30 fish per person for private and charter vessels conducting trips longer than 12 hours. Additionally, the commenter feels the August closure would have a serious financial impact on the owners and crews of vessels from the Ocean City, Maryland, area and

would "simply allow for a great September."

**Response:** Possession limits were discussed at the December 1997 Council meeting. Marine Recreation Statistical Survey data showed that the average number of black sea bass landed per successful trip was 5.4 in 1996. Council analysis showed that imposing a 10-inch (25.4-cm) minimum size limit and a possession limit as low as seven fish per person would achieve the necessary reduction in recreational black sea bass landings and, on average, allow an additional three fish per person possession. However, at the December 1997 meeting, public comment of those industry members in support of possession limit restrictions strongly supported a greater than 20 fish per person possession limit. As a result of these discussions, the Council and Commission proposed two alternative options that would allow each state to choose either of the two options, one of which did contain a 20 fish per person possession limit. However, the FMP does not allow the Council to specify alternative measures or to adopt measures that differ from those specified by the Council. NMFS did not recommend the 20 fish per person possession limit because the seasonal restriction appears to be more widely accepted based on comments from the December 1997 Council meeting and the comment period for the proposed rule. This is the only comment in opposition.

The commenter's suggestion of "half day" versus "full day" possession limits is not feasible at this time. To implement this type of measure, a method to track vessel departures and arrivals would have to be developed. Any such system for the recreational sector would be burdensome and not cost effective for the industry. Regarding the commenter's suggestion of allowing an unlimited possession of black sea bass is "hardly good science," Council analysis of the best data available shows that the seasonal closure and minimum fish size implemented in 1998 are expected to constrain anglers by the needed 47 percent in 1998.

The commenter provided no indication of support for seasonal closures in general. While the commenter notes that the proposed seasonal closure will likely have a serious financial impact on owners and crews in the Ocean City, Maryland area, he admits that croaker may replace black sea bass during the August 1 through August 15 closure and that the

respite provided by the closure will result in a "great September." As noted in an earlier response, NMFS concludes that specific measures may have somewhat different impacts geographically, but, overall, NMFS determined that the rule would not have a significant impact upon recreational fishermen in this sector. It is likely that recreational anglers will target other species that are relatively more abundant (such as striped bass) when faced with potential reductions in the amount of summer flounder and black sea bass they are allowed to catch due to decreases in the respective recreational harvest limits.

#### Classification

This action is authorized by 50 CFR part 648.

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

When this rule was proposed, the Assistant General Counsel for Legislation and Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Because no comments were received regarding this certification and the basis for it remains unchanged, a regulatory flexibility analysis was not prepared.

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

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 15, 1998.

**Gary C. Matlock,**

*Acting 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 § 648.103, paragraph (b) is revised to read as follows:

##### § 648.103 Minimum fish sizes.

\* \* \* \* \*

(b) The minimum size for summer flounder is 15 inches (38 cm) TL for all vessels that do not qualify for a moratorium permit, and party boats holding a moratorium permit if fishing

with passengers for hire or carrying more than five crew members, or charter boats holding a moratorium permit if fishing with more than three crew members.

\* \* \* \* \*

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

##### § 648.105 Possession restrictions.

(a) No person shall possess more than eight summer flounder in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a summer flounder moratorium permit or is issued a summer flounder dealer permit. \* \* \*

\* \* \* \* \*

4. Section 648.142 is revised to read as follows:

##### § 648.142 Time restrictions.

Vessels that are not eligible for a moratorium permit under § 648.4(a)(6) and fishermen subject to the possession limit may not fish for black sea bass from August 1 through August 15. This time period may be adjusted pursuant to the procedures in § 648.140.

5. In § 648.143, paragraph (a) is revised, existing paragraph (b) is redesignated as paragraph (c), and new paragraph (b) is added to read as follows:

##### § 648.143 Minimum fish sizes.

(a) The minimum size for black sea bass is 10 inches (25.4 cm) total length for all vessels issued a moratorium permit under § 648.4(a)(7) that fish for or retain black sea bass in or from U.S. waters of the western Atlantic Ocean from 35°15.3' N. Lat., the latitude of Cape Hatteras Light, North Carolina, northward to the U.S.-Canada border. The minimum size may be adjusted for commercial vessels pursuant to the procedures in § 648.140.

(b) The minimum size for black sea bass is 10 inches (25.4 cm) TL for all vessels that do not qualify for a moratorium permit, and party boats holding a moratorium permit if fishing with passengers for hire or carrying more than five crew members, or charter boats, holding a moratorium permit if fishing with more than three crew members. The minimum size may be adjusted for recreational vessels pursuant to the procedures in § 648.140.

\* \* \* \* \*

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