

NMFS may determine, once 2008 estimates are complete, that the retention limit should be adjusted in order to meet the limit on school BFT over the 4-year balancing period. NMFS has the authority either to make inseason adjustments to the Angling category quota during the 2008 fishing year, or, depending on the results of the LPS data and analyses and the needs of the fishery, may make necessary adjustments (such as retention limits, quotas, and subquotas) in the 2009 fishing year specifications and effort controls.

#### Classification

NMFS publishes these final specifications and effort controls under the authority of the Magnuson-Stevens Act and ATCA. The Assistant Administrator for Fisheries (AA) has determined that the regulations contained in this final rule are necessary to implement the recommendations of ICCAT and to manage the domestic Atlantic HMS fisheries, and are consistent with the Magnuson-Stevens Act and its National Standards.

This final rule been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

**Authority:** 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2007.

**Samuel D. Rauch III,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 071030625-7696-02]

RIN 0648-XC84

#### Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2008 Summer Flounder, Scup, and Black Sea Bass Specifications; Preliminary 2008 Quota Adjustments; 2008 Summer Flounder Quota for Delaware

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues final specifications for the 2008 summer flounder, scup, and black sea bass fisheries. This final rule specifies allowed harvest limits for both commercial and recreational fisheries, including commercial scup possession limits. This action prohibits federally permitted commercial vessels from landing summer flounder in Delaware in 2008 due to continued quota repayment from previous years' overages.

The actions of this final rule are necessary to comply with regulations implementing the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP), as well as to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The intent of this action is to establish harvest levels and other management measures to ensure that target fishing mortality rates (F) or exploitation rates, as specified for these species in the FMP, are not exceeded. In addition, this action implements measures that ensure continued rebuilding of these three overfished species and ends overfishing in the summer flounder fishery.

**DATES:** Effective January 1, 2008, through December 31, 2008.

**ADDRESSES:** Copies of the specifications document, including the Environmental Assessment (EA), Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and other supporting documents used by the Summer Flounder, Scup, and Black Sea Bass Monitoring Committees are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room

2115, Federal Building, 300 South Street, Dover, DE 19901-6790. The specifications document is also accessible via the Internet at <http://www.nero.noaa.gov>. The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses contained in this final rule, and the summary of impacts and alternatives contained in this final rule. Copies of the small entity compliance guide are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively under the provisions of the FMP developed 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. 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 (NC) 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. The Council prepared the FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the FMP appear at 50 CFR part 648, subparts A (general provisions), G (summer flounder), H (scup), and I (black sea bass). General regulations governing U.S. fisheries also appear at 50 CFR part 600. States manage summer flounder within 3 nautical miles of their coasts, under the Commission's plan for summer flounder, scup, and black sea bass. The Federal regulations govern vessels fishing in the exclusive economic zone (EEZ), as well as vessels possessing a Federal fisheries permit, regardless of where they fish.

The regulations outline the process for specifying the annual catch limits for the summer flounder, scup, and black sea bass commercial and recreational fisheries, as well as other management measures (e.g., mesh requirements, minimum fish sizes, gear restrictions,

possession restrictions, and area restrictions) for these fisheries. The measures are intended to achieve the annual targets set forth for each species in the FMP, specified either as an F or an exploitation rate (i.e., the proportion of fish available at the beginning of the year that may be removed by fishing during the year). Once the catch limits are established, they are divided into quotas based on formulas contained in the FMP. Detailed background information regarding the status of the summer flounder, scup, and black sea bass stocks and the development of the 2008 specifications for these fisheries was provided in the proposed specifications (72 FR 64023; November 14, 2007). That information is not repeated here.

NMFS will establish the 2008 recreational management measures for summer flounder, scup, and black sea bass by publishing proposed and final rules in the **Federal Register** at a later date, following receipt of the Council's recommendations as specified in the FMP.

#### Summer Flounder

The FMP requires that annual fishing levels (i.e., Total Allowable Landings or TAL) must achieve at least a 50-percent probability of constraining harvests to an F rate that produces the maximum yield per recruit, or  $F_{MAX}$ . The best

available scientific information from the 2007 updated summer flounder assessment conducted by the Southern Demersal Working Group (SDWG), using the methods and models recommended for continued use by the NMFS Office of Science and Technology during its 2006 peer review, indicates that  $F_{MAX}$  for 2008 is 0.28. However, the best available scientific information also indicates that, for 2008, a TAL set lower than the  $F_{MAX}$  level is needed to ensure that the rebuilding objective of 197.2 million lb (89,448 mt) spawning stock biomass (SSB) can be attained by the rebuilding period end date of January 1, 2013. For 2008, the  $F_{TARGET}=F_{REBUILD}$  at 0.199.

The TAL associated with the target F (i.e.,  $F_{REBUILD}$  for 2008) is allocated 60 percent to the commercial sector and 40 percent to the recreational sector by the FMP. The commercial quota is allocated to the coastal states based upon percentage shares specified in the FMP. The recreational harvest limit is specified on a coastwide basis. Recreational measures will be the subject of a separate rulemaking early in 2008.

This final rule implements the specifications contained in the November 14, 2007, proposed rule—a summer flounder TAL of 15.77 million lb (7,153 mt) for 2008. This TAL has a 75-percent probability of achieving the

$F_{REBUILD}$  target of 0.199, and a 99-percent probability that the overfishing threshold,  $F_{MAX}=0.28$ , will not be exceeded in 2008.

Three research projects that would utilize the full summer flounder research set-aside (RSA) of 233,192 lb (106 mt) have been conditionally approved by NMFS and are currently awaiting notice of award. After deducting this RSA, the TAL is divided into a commercial quota of 9,322,085 lb (4,228 mt) and a recreational harvest limit of 6,214,723 lb (2,819 mt). If a proposed project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the summer flounder TAL through publication in the **Federal Register**.

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 2007, plus any previously unaccounted for overages from January–December 2006. Table 1 summarizes, for each state, the commercial summer flounder percent share, the 2008 commercial quota (both initial and less the RSA), the quota overages as described above, and the resulting final adjusted 2008 commercial quota less the RSA.

TABLE 1.—FINAL STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2008

State	Percent share	Initial quota		Initial quota less RSA		2007 Quota overages (through 10/31/07) <sup>1</sup>		Adjusted quota less RSA	
		lb	kg	lb	kg	lb	kg	lb	kg
ME .....	0.04756	4,500	2,041	4,434	2,011	0	0	4,434	2,011
NH .....	0.00046	44	20	43	19	0	0	43	19
MA .....	6.82046	645,352	292,732	635,809	288,403	20,591	9,340	615,218	279,063
RI .....	15.68298	1,483,924	673,108	1,461,981	663,154	0	0	1,461,981	663,154
CT .....	2.25708	213,565	96,873	210,407	95,441	0	0	210,407	95,441
NY .....	7.64699	723,558	328,206	712,859	323,353	15,375	6,974	697,484	316,379
NJ .....	16.72499	1,582,519	717,830	1,559,118	707,216	0	0	1,559,118	707,216
DE .....	0.01779	1,683	764	1,658	752	55,556	25,200	–53,898	–24,448
MD .....	2.03910	192,940	87,517	190,087	86,223	0	0	190,087	86,223
VA .....	21.31676	2,016,992	914,907	1,987,166	901,379	0	0	1,987,166	901,379
NC .....	27.44584	2,596,925	1,177,965	2,558,524	1,160,547	0	0	2,558,524	1,160,547
Total <sup>2</sup> .....	100.00	9,462,001	4,291,964	9,322,086	4,228,498	91,522	41,514	9,284,462	4,211,431

<sup>1</sup> 2007 quota overage is determined through comparison of landings for January through October 2007, plus any landings in 2006 in excess of the 2006 quota (that were not previously addressed in the 2007 specifications), with the 2007 emergency rule quota for each state (72 FR 2458, January 19, 2007). For Delaware, includes continued repayment of overharvest from 2007 and previous years.

<sup>2</sup> Total quota is the sum of all states having allocation. A state with a negative number has a 2008 allocation of zero (0). Kilograms are as converted from pounds and may not necessarily add due to rounding.

The Commission has established a system whereby 15 percent of each state's quota may be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery in a state has been closed. The intent of the incidental

catch set-aside is to reduce discards by allowing fishermen to land summer flounder caught incidentally in other fisheries during the year, while ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in these 2007 final

summer flounder specifications because NMFS does not have authority to establish such subcategories.

#### Delaware Summer Flounder Closure

Table 1 indicates that, for Delaware, the amount of the 2007 summer

flounder quota overage (inclusive of overharvest from previous years) is greater than the amount of commercial quota allocated to Delaware for 2008. As a result, there is no quota available for 2008 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 (Regional Administrator), has determined no longer has commercial quota available for harvest. Therefore, effective January 1, 2008, landings of summer flounder in Delaware by vessels holding commercial Federal summer flounder fisheries permits are prohibited for the 2008 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 2008 calendar year, unless additional quota becomes available through a transfer, as mentioned above.

#### Scup

The 2008 fishing season is year 1 of the 7-year, constant F strategy scup rebuilding plan implemented by Amendment 14 to the FMP (72 FR 40077; July 23, 2007). The target exploitation rate for scup in 2008 is 9 percent, which will result in an  $F=0.10$ ,

as called for under the rebuilding plan. The FMP specifies that the Total Allowable Catch (TAC) associated with a given exploitation rate be allocated 78 percent to the commercial sector and 22 percent to the recreational sector. Scup discard estimates are deducted from both sectors' TACs to establish TALs for each sector, i.e., TAC minus discards equals TAL. The commercial TAC, discards, and TAL (commercial quota) are then allocated on a percentage basis to three quota periods, as specified in the FMP: Winter I (January–April)—45.11 percent; Summer (May–October)—38.95 percent; and Winter II (November–December)—15.94 percent. The recreational harvest limit is allocated on a coastwide basis. Recreational measures will be the subject of a separate rulemaking early in 2008.

This final rule implements the specifications contained in the November 14, 2007, proposed rule: A 9.9-million-lb (4,491-mt) scup TAC and a 7.34-million-lb (3,329-mt) scup TAL. The TAC is divided into the commercial (78 percent) and recreational (22 percent) allocations, in accordance with the FMP; then the respective discard estimates are subtracted to yield the preliminary TAL. After deducting 214,000 (97 mt) of RSA for the three approved research projects, the initial TAL is a commercial quota of 5,248,000 lb (2,381 mt) and a recreational harvest limit of 1,830,920 lb (830 mt). If a

proposed project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the scup TAL through publication in the **Federal Register**.

Consistent with the revised quota setting procedures established for the FMP (67 FR 6877, February 14, 2002), scup overages are determined based upon landings for the Winter I and Summer 2007 periods, plus any previously unaccounted for landings from January–December 2006. Table 2 presents the final 2008 commercial scup quota for each period and the reported 2007 landings for the 2007 Winter I and Summer periods. There was no overage of the Winter I quota; however, an overage of 624,876 lb (283 mt) occurred during the Summer quota period. As a result, the 2008 Summer period quota is reduced by this amount.

On July 24, 2007, (72 FR 40263) NMFS announced a transfer of unharvested quota from the Winter I to the Winter II 2007 quota period. Per the quota accounting procedures, after June 30, 2008, NMFS will compile all available landings data for the 2007 Winter II quota period and compare the landings to the 2007 Winter II quota period allocation, as adjusted by the aforementioned transfer. Any overages will be determined and deductions, if needed, will be made to the Winter II 2008 allocation and published in the **Federal Register**.

TABLE 2.—SCUP PRELIMINARY 2007 COMMERCIAL LANDINGS BY QUOTA PERIOD

Quota period	2007 Quota		Reported 2007 Landings through 10/31/07		Preliminary Overages as of 10/31/07	
	lb	mt	lb	mt	lb	mt
Winter I .....	4,012,895	1,820	3,386,505	1,536	0	0
Summer .....	3,464,914	1,572	4,089,790	1,855	624,876	283
Winter II .....	1,417,991	643	N/A	N/A	N/A	N/A
Total .....	8,895,800	4,035	7,476,295	3,391	N/A	N/A

N/A = Not applicable.

Table 3 presents the commercial scup percent share, 2008 TAC, projected discards, 2008 initial quota (with and without the RSA deduction), overage deductions (as necessary), and initial possession limits, by quota period. This

final rule continues the status quo Winter I period (January–April) per-trip possession limit of 30,000 lb (13.6 mt), and a Winter II period (November–December) initial per-trip possession limit of 2,000 lb (907 kg). The Winter I

per-trip possession limit will be reduced to 1,000 lb (454 kg) when 80 percent of the commercial quota allocated to that period is projected to be harvested.

TABLE 3.—INITIAL COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2008 BY QUOTA PERIOD

Quota period	Per-cent share	Total allowable catch		Discards		Initial quota		Initial quota less overages (through 10/31/2007) <sup>1</sup>		Adjusted quota less overages and RSA		Possession limits (Per trip) <sup>2</sup>	
		lb	mt	lb	mt	lb	mt	lb	mt	lb	mt	lb	kg
Winter I .....	45.11	3,483,394	1,580	1,019,486	462	2,463,908	1,118	N/A	N/A	2,367,373	1,074	30,000	13,608
Summer .....	38.95	3,007,719	1,364	880,270	399	2,127,449	965	1,502,573	682	1,419,220	644	N/A	N/A

TABLE 3.—INITIAL COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2008 BY QUOTA PERIOD—Continued

Quota period	Per-cent share	Total allowable catch		Discards		Initial quota		Initial quota less overages (through 10/31/2007) <sup>1</sup>		Adjusted quota less overages and RSA		Possession limits (Per trip) <sup>2</sup>	
		lb	mt	lb	mt	lb	mt	lb	mt	lb	mt	lb	kg
Winter II .....	15.94	1,230,887	558	360,244	163	870,643	395	N/A	N/A	836,531	379	2,000	907
Total <sup>3</sup> .....	100.0	7,722,000	3,503	2,260,000	1,025	5,462,000	2,478	N/A	N/A	4,623,124	2,097	N/A	N/A

<sup>1</sup> An overage of 624,876 lb (283 mt) occurred during the 2007 Summer quota period.

<sup>2</sup> 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**.

<sup>3</sup> 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 § 648.120(a)(3), this final rule maintains the Winter II possession

limit-to-rollover amount ratios that were in place for the 2007 fishing year, as shown in Table 4. 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 4.—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		Final 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

For 2008, the target exploitation rate for black sea bass is 25 percent. The FMP specifies that the TAL associated with a given exploitation rate be allocated 49 percent to the commercial sector and 51 percent to the recreational sector. The recreational harvest limit is allocated on a coastwide basis. Recreational measures will be the subject of a separate rulemaking early in 2008.

This final rule implements the specifications contained in the November 14, 2007, proposed rule: A 4.22-million-lb (1,194-mt) black sea bass TAL. After deducting 85,790 lb (39 mt) of RSA for the three approved research projects, the TAL is divided into a commercial quota of 2,025,763 lb (919 mt) and a recreational harvest limit of 2,108,447 lb (9569 mt). If a proposed project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the black sea bass TAL through publication in the **Federal Register**. Consistent with the revised quota setting procedures for the FMP, black sea bass overages are determined based upon landings for the period January–September 2007, plus

any previously unaccounted for landings from January–December 2006. There were no overages for either period; thus, no overage deduction adjustment to the 2008 commercial quota is necessary.

### Comments and Responses

NMFS received 25,443 comments during the comment period for the November 14, 2007, proposed rule. Of these, 20,159 comments were received through the prescribed methods outlined in the proposed rule: Electronic submission via the Federal eRulemaking Portal (<http://www.regulations.gov>); fax; standard mail; and hand delivery. An additional 5,284 were sent via e-mail to the Regional Administrator. Though these comments were not supplied through the prescribed methods, they were form letters that make the same points as other comments received through the established public comment system and are therefore addressed in this final rule's responses to comments. In addition, one comment letter contained over 14,000 signatories. This letter was treated as 14,000+ comments for the purposes of the total comments received enumeration listed above.

Comments were received from the representatives of several conservation groups, recreational and commercial fishery associations and advocacy groups, and private citizens. The vast majority (99 percent) of comments received were from individual members of various conservation groups and from a conservation-based recreational fishery advocacy group who urged NMFS to adopt a summer flounder TAL lower than the 15.77-million-lb (7,153-mt) implemented by this final rule.

Only comments that were applicable to the proposed 2008 specifications, including the analyses used to support these specifications, are addressed in this preamble. The majority of the comments submitted contained the same or similar language; therefore, the significant issues and concerns have been summarized and responded to here.

*Comment 1:* Many commenters suggested that a 15.77-million-lb (7,153-mt) summer flounder TAL for 2008 has less than the required regulatory and 2000 Federal court-ordered <sup>1</sup> 50-percent probability of constraining fishing mortality below the overfishing level

<sup>1</sup> *Natural Resources Defense Council v. Daley* Civil NO. 1:99 CV00221(JLG).

( $F_{MAX} = 0.28$ ) in 2008. These commenters advocated for a lower 2008 TAL and suggested that the TAL be established anywhere from a low of 8.0 million lb (3,629 mt) to a high of 12.9 million lb (5,851 mt). The majority of commenters advocating for a lower TAL indicated that NMFS should implement the 11.64-million-lb (5,280-mt) TAL, on the low end of the Summer Flounder Monitoring Committee's (Monitoring Committee) recommended TAL range.

*Response:* NMFS disagrees that the proposed TAL, which is implemented through this final rule, fails to meet the regulatory and legal requirements to prevent overfishing. Analysis conducted by the Northeast Fisheries Science Center (NEFSC) indicates that a 15.77-million-lb (7,153-mt) TAL has a 99-percent probability of not exceeding the overfishing level ( $F_{MAX} = 0.28$ ) in 2008. Responses to comments 2 through 7 contain additional justification for the selection of the TAL implemented by this final rule.

*Comment 2:* Many commenters indicated that they believe the 15.77-million-lb (7,153-mt) summer flounder TAL has less than a 50-percent probability of meeting the  $F_{REBUILD}$  target recommended by the Monitoring Committee ( $F_{REBUILD}$  adjusted = 0.143) and is, therefore, in violation of the summer flounder regulations and Federal court order.

*Response:* Contrary to the interpretation of the commenters, the specific regulatory and Federal court-ordered requirement for probabilities of success regarding the annual TAL is limited to providing at least a 50-percent probability of not exceeding the overfishing threshold ( $F_{MAX} = F_{MSY} = 0.28$ ). There is no specific regulatory or statutory requirement that NMFS must meet regarding probabilities for success relative to  $F_{REBUILD}$ . The Council and NMFS may choose from among various alternative rebuilding strategies. Analysis provided by the Monitoring Committee indicates that a 15.77-million-lb (7,153-mt) TAL has a 75-percent probability of not exceeding  $F_{REBUILD} = 0.199$ , which is lower than  $F_{MAX} = 0.28$ .

*Comment 3:* Several commenters relayed that they expected a 15.77-million-lb (7,153-mt) summer flounder TAL in 2008 to prevent sufficient continued stock growth and will prevent the rebuilding target of 197.2 million lb (89,448 mt) SSB from being attained by the January 1, 2013, rebuilding period end date, as required by the Magnuson-Stevens Act.

*Response:* Stock projections using a 15.77-million-lb (7,153-mt) summer flounder TAL, based on  $F_{REBUILD} = 0.199$

in 2008, indicate that the stock can achieve the rebuilding target biomass level by January 1, 2013. This TAL and  $F$  in 2008 provide a 75-percent probability that the rebuilding target will be met within the required time frame. The responses to comments 5 and 6 provide additional information germane to stock growth and rebuilding.

*Comment 4:* Many commenters asserted that overfishing has occurred in the summer flounder fishery since 1982 and that a 15.77-million-lb (7,153-mt) summer flounder TAL will not end overfishing in 2008.

*Response:* NMFS reiterates that a 15.77-million-lb (7,153-mt) summer flounder TAL is projected to have a 99-percent probability of constraining harvest below the overfishing level in 2008. In addition, the first definition of overfishing for summer flounder was not established until the adoption of Amendment 2 to the FMP, which occurred in 1991. NMFS acknowledges that exploitation on the summer flounder stock was high, prior to the establishment of an overfishing definition, but overfishing was not assessed relative to an established threshold. The Sustainable Fisheries Act of 1996 established a requirement for rebuilding periods for U.S. fisheries that were determined to be overfished. Overfishing has occurred in the summer flounder fishery each year of the rebuilding period for which complete data are available, 2000–2006. Evaluation of the 2007 fishery performance will not be available until mid-2008, after the commercial and recreational fishery data has been compiled and audited.

The level of overfishing has decreased substantially over the course of the rebuilding period, even with the retrospective pattern that has resulted in estimated  $F$ 's increasing for previous years when more recent data are added to the assessment model. Until 2006, the TAL was set at the  $F_{MAX}$  level with only a 50-percent probability for success in all but one year (i.e., the 2004 fishing year, for which the TAL was set at the  $F_{MAX}$  level with a 75-percent probability for success). For the 2007 fishery, the TAL was established to achieve a lower  $F_{REBUILD}$  level, with a 75-percent probability of success of achieving that lower target. Over the course of the rebuilding period, NMFS and the Council have been successful at substantially reducing fishing mortality. NMFS expects, based on the analysis of the 2008 TAL and the associated 99-percent probability of success, that overfishing will not occur in 2008. NMFS is also prepared to further constrain or close the recreational

fishery in Federal waters of the EEZ during or prior to the fishing season, if needed, to further insure that 2008 mortality objectives for the summer flounder fishery are met and to ensure that overfishing does not occur.

*Comment 5:* Some commenters expressed concern that the 15.77-million-lb (7,153 mt) summer flounder TAL fails to compensate directly for the retrospective pattern in the stock assessment modeling approach and does not provide for an adequate buffer between the maximum sustainable yield and overfishing level in compensation for the model uncertainty.

*Response:* The advice of the SDWG in regards to the retrospective pattern for the 2007 stock assessment update was, "Given the persistent retrospective underestimation of fishing mortality in the [stock] assessment, [fishery] managers should consider adopting a lower TAL for 2008 than indicated by the median projection results to reduce the risk that overfishing will occur." Similarly, the advice of the 2006 biological reference point peer review was that, "The [peer review] Panel does not find that it is necessary to make an explicit adjustment for the retrospective pattern in the VPA [Virtual Population Analysis; stock assessment model] results. The pattern diminishes in the last year [2005], its cause is not clear, and past patterns in the opposite direction have also diminished after a few years." The median projection result for 2008 is the TAL resulting from a 50-percent probability of achieving  $F_{MAX} = 0.28$  and would yield a TAL of 23.8 million lb (10,807 mt). NMFS has followed the advice from the independent stock assessment review body and recent peer review and set the TAL for 2008 at the lower  $F_{REBUILD} = 0.199$  level, with a further reduction by using the 25th percentile projection (i.e., a 75-percent probability of achieving the  $F_{REBUILD}$ ). This is the most risk-averse approach yet applied to setting a summer flounder TAL since the rebuilding period began in 2000.

NMFS acknowledges that the 2008 TAL does not explicitly adjust for the retrospective pattern as was recommended by the Monitoring Committee. However, the TAL implemented by this rule is consistent with the advice of the independent stock assessment body and the SDWG, and reduces the TAL from the minimum level required by the regulations to lower the risk that overfishing will occur in 2008.

The TAL provides for high probabilities of success relative to both the overfishing threshold ( $F_{MAX}$ ) and the necessary rebuilding  $F$  ( $F_{REBUILD}$ ) to

ensure continued stock rebuilding. Similarly, the TAL does provide a precautionary approach by employing the  $F_{REBUILD}$  rather than the  $F_{MAX}$  level, and by utilizing a probability higher than the 50-percent required, at 99-percent, of not exceeding the overfishing threshold ( $F_{MAX}$ ). This TAL has been reduced 33.7 percent from the median projection (i.e., 50-percent probability of success)  $F_{MSY}=F_{MAX}$  level to compensate for uncertainty.

*Comment 6:* The majority of the commenters suggested that implementing a TAL higher than the Monitoring Committee's recommended TAL range is contrary to scientific advice. These commenters asserted that this is in violation of the reauthorized Magnuson-Stevens Act that the Council may not set annual catch limits higher than the recommendations of the Council's Scientific and Statistical Committee (SSC), ignores the best available science as required by National Standard 2 of the Magnuson-Stevens Act, and is inconsistent with public hearing documents for proposed National Standard 1 guidelines.

*Response:* All of the TAL options evaluated by the Monitoring Committee, including the 15.77-million-lb (7,153-mt) TAL implemented by this final rule, were derived using the most recent stock assessment update provided by the SDWG. The SDWG utilized the modeling approaches and methods recommended for continued use by the NMFS Office of Science and Technology in its 2006 peer review of the summer flounder biological reference points. The data utilized in the 2007 SDWG update are the most recent, best available, fishery-independent, recreational, and commercial fishery-dependent information and, as such, are consistent with National Standard 2 and constitute the best available scientific information. The selection of a TAL from among those options developed by the Monitoring Committee represents a policy choice for the Council and NMFS. NMFS and the Council recognize that TALs within the Monitoring Committee's recommended range would be more risk averse than the TAL implemented by this rule; however, NMFS is confident that the 15.77-million-lb (7,513-mt) TAL is sufficiently risk averse to ensure that all the regulatory and statutory requirements pertaining to annual TALs and rebuilding are met while somewhat mitigating the economic impacts associated with a reduction in harvest level (see responses to comments 1 through 7 for additional information).

The FMP's implementing regulations specify that the Monitoring Committee

shall recommend fishing levels that produce the maximum yield per recruit ( $F_{MAX}$ ) with at least a 50-percent probability of success. There is no regulatory requirement that the Council adopt the recommendations of the Monitoring Committee, nor is the Monitoring Committee explicitly required to forward recommendations to achieve rebuilding or attain alternate  $F$  targets, other than those that would yield at least a 50-percent probability of constraining  $F$  at or below the overfishing level.

The reauthorized Magnuson-Stevens Act specifies that the Council's SSC shall provide ongoing scientific advice to the Council for, among other things, annual catch levels, ending overfishing, and achieving rebuilding targets. The Council's SSC did not review the updated 2007 assessment, nor did it make recommendations to the Council regarding the 2008 summer flounder TAL. NMFS has encouraged the Council to modify its operating procedures so that SSC review is incorporated into the annual specification setting process; however, to date this has not been done. There is no statutory requirement that NMFS only implement recommendations that have been vetted through the Council's SSC.

The Magnuson-Stevens Reauthorization Act was signed into law in January 2007. Development and implementation of guidance for several changes in the Act are in various stages of development. Guidance from the Secretary of Commerce, via NMFS, to Councils on SSC use is expected in the near-term. In the interim, the Council has developed internal guidance that relies on Monitoring Committee recommendations for specification setting, such that overfishing does not occur. The Annual Catch Limit (ACL) provisions of the Magnuson-Stevens Reauthorization Act are not required to be in place until 2010 or 2011, dependent on the status of the stock in question. The Monitoring Committee, while composed of scientists and individuals with stock assessment expertise, is not the same as the Council's SSC and, therefore, neither the Council nor NMFS is under any statutory requirement to accept its recommendations when other alternatives are available that also satisfy the regulatory and statutory requirements for annual summer flounder TALs.

NMFS has not yet published a proposed rule containing guidance for the application of National Standard 1 under the reauthorized Magnuson-Stevens Act. While the public hearing document supplied in advance of the

proposed rule was provided to form the basis of discussions with the public, final guidance has yet to be developed and may differ from the hearing document and/or proposed rule, when published in the **Federal Register**. The public will have opportunity to provide comment during the proposed rule comment period, once a proposed rule is published. The response to comment 5 contains information on the level of precaution associated with the 15.77-million-lb (7,153-mt) TAL implemented by this final rule.

As previously outlined, NMFS has a regulatory obligation to satisfy when implementing an annual summer flounder TAL (i.e., by implementing a TAL with at least a 50-percent probability that overfishing will not occur). For 2008, both the Monitoring Committee and Council's recommendations satisfy this requirement. NMFS must use the best available scientific information, consistent with National Standard 2. The TAL implemented by this final rule does so, as outlined previously in this response and in the response to comment 5. NMFS must also ensure that the TAL provides a reasonable probability for continued stock rebuilding so that the stock is rebuilt no later than January 1, 2013; but is under no legal or regulatory requirement to adopt any particular rebuilding strategy as long as it complies with the requirements of section 304(e) of the Magnuson-Stevens Act. As long as the TAL satisfies these requirements, the selection of one TAL over another is a policy choice for the Council and the agency. For 2008, NMFS agrees with the Council that a TAL of 15.77-million-lb (7,153-mt) satisfies all of these performance metrics while mitigating some of the economic impacts associated with the lower TAL options and finds no legal or regulatory impediment to prevent implementation of the Council's recommendation.

The process for setting TALs is performed annually. Each year, the performance of the previous year's TAL and  $F$  target are evaluated along with updates to the stock status and the projected TALs and  $F$  targets needed in the remaining rebuilding years (e.g., 2009–2012) to ensure the rebuilding target is met. In any given year, adjustments may be needed to the projections utilized in the previous year's assessments to ensure that the regulatory and statutory rebuilding requirements continue to be met. This was the case for 2008, in which a TAL lower than what was projected in 2007 is needed to ensure continued rebuilding. Implementation of the 15.77-

million-lb (7,153-mt) TAL for 2008 does not lock the rebuilding trajectory into an unadjustable course of action for the remainder of the rebuilding period.

While NMFS is not implementing the specific recommendations of the Monitoring Committee, the 15.77-million-lb (7,153-mt) TAL is consistent with the recommendations of the SDWG recommendation to use a TAL lower than the median projection (i.e., 50-percent probability) to minimize the possibility that overfishing will occur.

*Comment 7:* Some commenters advocating for a lower 2008 TAL expressed concern that the approach taken by NMFS for 2008 is for a short-term gain with long-term negative stock implications for the remainder of the rebuilding period.

*Response:* NMFS disagrees that the TAL implemented by this final rule would have negative stock implications for the remainder of the rebuilding period. There is no evidence that the 15.77-million-lb (7,153-mt) TAL would adversely affect the summer flounder stock. Under all the scenarios presented by the Monitoring Committee and evaluated by the Council, the stock is expected to continue to increase toward, and attain, the rebuilding target within the rebuilding period. The distinction among the alternative TALs considered has nothing to do with the potential adverse impacts to the stock, but rather on the probability of achieving a specific rebuilding trajectory. NMFS is confident that the TAL implemented by this rule will prevent overfishing and enable the stock to continue rebuilding.

*Comment 8:* Some commenters advocating for a higher 2008 TAL stated that the summer flounder stock is at a historic high, healthy, and does not need further quota reductions in 2008. In addition, they stated that summer flounder biomass as high as the biomass target has never been seen before, and current stock conditions are the highest in 25 years.

*Response:* NMFS acknowledges that the summer flounder biomass has been at high levels in recent years, peaking in 2005 at the highest level in the 40-year NEFSC trawl survey time series; however, stock size decreased from the 2005 to 2006 stock assessment and the biomass target has not yet been achieved. Additional harvest reductions are necessary in 2008 to continue stock growth toward the rebuilding target biomass level. Projections indicate that the TAL implemented by this final rule will provide for sufficient stock growth in 2008 to maintain a trajectory sufficient to attain the rebuilding target no later than January 1, 2013. Based on the accepted and frequently peer-

reviewed stock assessment model, the full potential growth of the stock has yet to be realized. None of the peer-reviewed science indicates that the rebuilding target cannot be attained within the rebuilding period or that the biomass target is incorrect.

*Comment 9:* Some commenters who felt the 2008 TAL was too low stated that they believe the summer flounder assessment is flawed and has not been critically peer reviewed by individuals outside of NMFS. The commenters suggested that the SSC and National Academies of Science should review the modeling methods and rebuilding target.

*Response:* NMFS disagrees. The statement that the summer flounder assessment has not been critically peer reviewed by persons from outside the agency is not true. The summer flounder stock assessment has been independently reviewed by scientists from outside NMFS twice in the rebuilding period: In 2002 as part of the NEFSC's Stock Assessment Review Committee (SARC) 35, and again in 2005 during SARC 41. In these reviews, a panel of independent stock assessment experts, provided by the Center for Independent Experts, critically reviewed the assessment methodology and data. While recommendations have been made to develop additional modeling approaches, these peer reviews have confirmed the current model and modeling approaches to be statistically valid for the annual stock assessment updates that provide the foundation for establishing the TAL.

The NMFS Office of Science and Technology convened an additional review of the biological reference points for the summer flounder stock to ensure that the 2007 quota for the fishery was based on the best possible scientific information available and used the best possible methodology. The review panelists were scientists with recognized stock assessment expertise who have not been involved in past summer flounder assessments: Two from the NMFS Northwest Region and one from Louisiana State University. The peer review panel recommended several adjustments in the assessment, and these were incorporated into the analysis that stemmed from the peer review and have been utilized by the SDWG in updating the assessment used to set the 2008 TAL.

NMFS agrees that the SSC should be involved in the Council's annual TAL recommendation process as a means to provide independent scientific advice on annual catch limits, consistent with the reauthorized Magnuson-Stevens Act.

A benchmark assessment, including peer review by independent stock assessment experts from the Center for Independent Experts, is scheduled to occur in 2008. The results of the benchmark assessment are expected to be made available for the 2009 specification setting process that will begin with the Council's August 2008, meeting. NMFS does not find an additional peer review by the National Academies of Science to be necessary in view of the multiple reviews conducted on the summer flounder assessment during the rebuilding period.

*Comment 10:* Most of the commenters favoring a higher 2008 summer flounder TAL expressed concerns about social and economic impacts, stating that continued reductions to the TAL in 2008 will have severe economic impacts to both commercial and recreational fishery participants, as well as support businesses (e.g., bait and tackle shops, waterfront hotels, and marinas), many of whom the commenters believe are likely to go out of business within the next year.

*Response:* NMFS acknowledges that there are economic impacts associated with reductions in the TAL from one year to the next and that continual decreases have a cumulative effect on fishery participants and associated businesses. A full discussion of the economic impacts expected to result from the 2008 TAL are contained in the EA/RIR/IRFA/specifications document prepared by the Council (see **ADDRESSES**) and summarized in the IRFA contained in the proposed rule (72 FR 64023; November 14, 2007), and is not repeated here. NMFS has a regulatory obligation to ensure that the TAL implemented has at least a 50-percent probability of not exceeding the overfishing threshold ( $F_{MAX}$ ), and a statutory obligation to ensure that the summer flounder stock is rebuilt to 197 million lb (89,411 mt) no later than January 1, 2013. The 15.77-million-lb (7,153-mt) TAL implemented by this rule satisfies these requirements. The TAL implemented is less restrictive than the Monitoring Committee's recommended range for 2008, which would have had higher economic impacts. Additional discussion of the steps taken to minimize, to the extent practicable, the economic impacts on small entities (i.e., Federal permit holders) is outlined in the FRFA, contained in the Classification section of this final rule.

Although this final rule does not directly regulate fishing support industries, NMFS acknowledges that potential reductions in fishing effort and associated expenditures may have

indirect impacts on hotels, restaurants, fishing gear and bait shops, and other associated businesses. Sufficient data are not available to enumerate or characterize the impacts of the 2008 TAL on these businesses.

*Comment 11:* One commenter believed commercial fisheries that degrade habitat and discard summer flounder are the cause of the stalled stock rebuilding.

*Response:* NMFS and the Council acknowledged in Amendment 13 to the FMP that mobile bottom-tending and stationary fishing gear have the potential to impact adversely essential fish habitat (EFH). Amendment 13 included alternatives that minimize, to the extent practicable, adverse impacts on EFH. Given that the scope of the specifications, which include the summer flounder TAL, is narrow by operation of the regulations and the TAL is consistent with the regulations implementing the FMP, the effects of commercial fishing on EFH are not required to be re-evaluated by the Council, and no new alternatives to minimize impacts were presented in its analysis of the 2008 specifications.

Discard estimates from both commercial and recreational fisheries are included in the annual stock assessment update that was utilized to derive the 2008 TAL; therefore, discard effects on stock growth are incorporated into the annual projections of mortality incurred by the summer flounder stock.

*Comment 12:* Many of those favoring a higher 2008 summer flounder TAL made statements to the effect that the rigid rebuilding timeline imposed by the Magnuson-Stevens Act is not based on science and the rebuilding target is unrealistic. One commenter also stated that the status of the summer flounder stock is not adequately reflected by the TAL options considered for 2008.

*Response:* NMFS is obligated to meet its statutory mandate to rebuild the summer flounder stock no later than the extended rebuilding deadline of January 1, 2013. While the summer flounder stock has increased in size since the rebuilding period began in 2000, it is not yet rebuilt. Multiple peer reviews of the summer flounder stock assessment and biological reference points have upheld that the rebuilding target is realistic and that it can be attained within the rebuilding period (see responses to comments 6, 8, and 9 for more information). The 2008 TAL implemented by this final rule was derived utilizing the same methods and data which have been previously peer reviewed and recommended for continued use. The 15.77-million-lb (5,153 mt) TAL is a reduction from the

maximum amount permissible under the regulations to ensure continued stock rebuilding and to end overfishing. NMFS acknowledges that the summer flounder stock has been at high levels in recent years (see response to comment 8) and has improved since the beginning of the rebuilding period. However, overfishing in the summer flounder fishery continued through 2006, the stock is overfished, and it has yet to reach its maximum potential.

*Comment 13:* One commenter commented that the proposed rule has no discussion on the existing summer flounder allocation between commercial and recreational fisheries.

*Response:* The annual specification process in the regulations does not permit the Council to evaluate or change the allocation between the commercial and recreational summer flounder fisheries. The Council has identified the commercial/recreational allocation as a topic for further development as part of Amendment 15 to the FMP. Development of Amendment 15 is expected to continue during 2008, with tentative completion scheduled for late 2010/early 2011.

*Comment 14:* One commenter stated that the Secretary of Commerce has an obligation to ensure that regulations implementing the rebuilding plan for summer flounder allocate the restrictions equitably and fairly and that there is no reference to this in the proposed rule for the public to evaluate if such issues are being addressed by the rulemaking.

*Response:* The Magnuson-Stevens Act section 303(a)(14) criteria referenced by the commenter are not required to be addressed in the annual specification setting. The section in question is in reference to FMP requirements and, as such, the criteria therein were addressed in Amendment 12 to the FMP, which established the summer flounder rebuilding program.

*Comment 15:* One commenter opposed the scup TAL, indicating that scup values from the spring survey index are not compelling for recommending a reduced quota and that the discard estimates were overestimated.

*Response:* The spring SSB 3-year average index value remains the best available information for assessing the status of the scup stock. The reduction in quota is not only the result of a reduced 2007 spring survey value, which reduced the 3-year average value, but is the result of implementing the scup stock rebuilding program contained in Amendment 14 to the FMP. The rebuilding plan requires a constant F of 0.10 for the years 2008–

2012. The discard estimates were generated using the NEFSC observer program and dealer data and the geometric mean discards-to-landings ratio. Recreational discards were estimated using the Marine Recreational Fisheries Statistical Survey (MRFSS). While both are produced annually and have not for this year been externally peer reviewed, the estimates were reviewed by the Scup Monitoring Committee and constitute the best scientific information available.

*Comment 16:* One commenter opposed the black sea bass TAL for 2008, stating that the 3-year average survey index is not appropriate for determining exploitable biomass.

*Response:* The most recent full stock assessment for black sea bass was completed in 2006 as part of the NEFSC SARC 43. The SARC rejected the results of this assessment for management use. Therefore, the previous assessment remains the best available scientific information and utilizes the 3-year moving average of the NEFSC spring survey catch-per-tow as a means to define exploitable biomass. NMFS continues to support the development of additional assessment methods for black sea bass; however, until such time that new methods are developed and accepted through peer review, the 3-year average NEFSC spring survey catch-per-tow remains the best available scientific information.

*Comment 17:* One comment was received in support of the 2008 conditionally approved RSA amounts.

*Response:* NMFS implements the proposed RSA amounts through this final rule.

### Classification

The Administrator, Northeast Region, NMFS, determined that this final rule is necessary for the conservation and management of the summer flounder, scup, and black sea bass fisheries and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for this rule. This action establishes specifications (i.e., annual quotas) for the summer flounder, scup, and black sea bass fisheries and possession limits for the commercial scup fishery.

Preparation of the proposed rule was dependent on the submission of the EA/RIR/IRFA in support of the specifications, which was developed by the Council. This document was received by NMFS late in September 2007. This documentation in support of the Council's recommended



specifications is required for NMFS to provide the public with information from the environmental and economic analyses as required in rulemaking. NMFS published the proposed rule as expeditiously as possible following a review of the Council's proposed specifications for compliance with the Magnuson-Stevens Act, the FMP and its implementing regulations, and other applicable law. The proposed rule was published on November 14, 2007, with a 21-day comment period ending December 3, 2007. Publication of the adjusted summer flounder quota by the start of the fishing year that begins January 1, 2008, is required by the order of Judge Robert Doumar in *North Carolina Fisheries Association v. Daley*.

If implementation of the specifications is delayed until beyond January 1, 2008, NMFS will be prevented from carrying out its legal obligation to prevent overfishing of these three species and will be in violation of a Federal court order. If a 30-day delay in effectiveness were to be required, the lack of effective quota specifications would prevent NMFS from closing the fishery should landings exceed the quotas. The summer flounder, scup, and black sea bass fisheries are all expected to be active at the start of the fishing season in 2008. In addition, the Delaware summer flounder fishery would be open for fishing, but in a negative quota situation. All of these factors could result in large overages that would have distributional effects on other quota periods and could disadvantage some gear sectors.

This final rule has been determined to be not significant for purposes of Executive Order 12866 because this action contains no implementing regulations.

This final rule does not duplicate, conflict, or overlap with any existing Federal rules.

Included in this final rule is the FRFA prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support the action. A copy of the EA/RIR/IRFA is available from the Council (see ADDRESSES).

The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

## Final Regulatory Flexibility Analysis

### Statement of Objective and Need

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

### Summary of Significant Issues Raised in Public Comments

Several of the comment letters received on the proposed rule specifically addressed the potential economic impact of reduction of the summer flounder TAL on the recreational fishing industry, particularly in NJ. No changes to the proposed rule were required to be made as a result of public comments. For a summary of the comments received, and the responses thereto, refer to the "Comments and Responses" section of this preamble.

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

The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal commercial or charter/party permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. The Council estimates that the 2008 quotas could affect 2,253 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2006, the most recent year for which complete permit data exists. The specific breakdown of permits, by species and type, are as follows: Commercial—summer flounder, 1,021 permits; scup, 884 permits; black sea bass, 928 permits and recreational charter/party—summer flounder 872; scup, 759; black sea bass, 832. Some individuals hold combinations of commercial and charter/party permits for one or more of the three species. The more immediate impact of this final rule will likely be felt by the 903 vessels that actively participated (i.e., landed these species) in these fisheries in 2006.

### Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

### Description of the Steps Taken to Minimize Economic Impact on Small Entities

Specification of commercial quotas and possession limits is constrained by the conservation objectives set forth in the FMP and implemented at 50 CFR part 648 under the authority of the Magnuson-Stevens Act. Economic impacts of reduced quota specifications, that reduce the number of fish that may be taken by participants of both commercial and recreational fisheries, may be offset by adjustments to such measures as commercial fish sizes, changes to mesh sizes, gear restrictions, or possession and trap limits that may increase efficiency or value of the fishery. For 2008, no such adjustments were recommended by the Council; therefore, this final rule contains no such measures. Therefore, the economic impact analysis of the action is evaluated solely on the different levels of quota specified in the alternatives. The ability of NMFS to minimize economic impacts for this action is constrained to approving quota levels that provide the maximum availability of fish while still ensuring that the required objectives and directives of the FMP, its implementing regulations, and the Magnuson-Stevens Act are met.

The economic analysis for the 2008 specification assessed the impacts for three alternatives. The no action alternative wherein no quotas are established for 2008, designated as Alternative 4, was excluded from analysis because it is not consistent with the goals and objectives of the FMP and the Magnuson-Stevens Act. Implementation of the no action alternative in 2008 would substantially complicate the approved management programs for these three species. NMFS is required under the FMP's implementing regulations to specify and implement a TAL (and TAC for scup) for these fisheries on an annual basis. The no action alternative would result in no TAL (and no scup TAC) for 2008 and would likely result in overfishing of the resources.

Alternative 3 (status quo) would maintain the specifications in place for these fisheries in 2007. As such, this is the least restrictive alternative and would produce the smallest impact on small entities. Because of the difference in RSA between 2007 and 2008, implementation of this alternative would result in minor increases in the quotas for all three species. However, implementation of Alternative 3 would likely result in the biological targets (i.e., fishing mortality and exploitation rates) specified in the FMP being

exceeded and would jeopardize the rebuilding plans for these overfished species. Alternative 3 is, therefore, inconsistent with the goals and objectives of the FMP, its implementing regulations, and the Magnuson-Stevens Act.

Alternative 2 is the most restrictive set of specifications for 2008. It includes the Monitoring Committee's recommended summer flounder TAL of 11.64 million lb (5,280 mt), a 5.02-million-lb TAL (2,277-mt) for scup, and a 3.75-million-lb (1,710-mt) TAL for black sea bass. The measures contained in Alternative 2 would meet all the objectives of the FMP and satisfy the requirements of the Magnuson-Stevens Act. Alternative 2 would also have the highest economic impact on small entities. This alternative was not selected for implementation as the measures contained therein were overly restrictive relative to the FMP and Magnuson-Stevens Act requirements for the three species.

This final rule implements Alternative 1, the Council's preferred alternative, which consists of the quota alternatives with an intermediate level economic impacts to small entities when compared to Alternatives 2 and 3. Relative to 2007, the 2008 commercial quotas and recreational harvest measures in this action would result in the following TAL decreases for the commercial and recreational sectors:

- 7.8 percent for summer flounder
- 38.8 percent for scup
- 15.6 percent for black sea bass

Alternative 1 was selected because it satisfies NMFS's obligation to implement specifications that are consistent with the goals, objectives, and requirements of the FMP, its implementing regulations, and the Magnuson-Stevens Act. The Alternative 1 TAL for summer flounder is sufficiently risk-averse, providing a high probability that the rebuilding F rate and an even higher probability that the overfishing threshold (FMAX) will not be exceeded in 2008. The rebuilding F,

TAL, and the associated probabilities for success were all derived using the best available, peer-reviewed scientific methods and modeling approaches. Alternative 1 provides for a higher summer flounder TAL than the most restrictive TAL and has the highest economic impact contained in Alternative 2. As such, Alternative 1 minimizes to the extent practicable, given the regulatory and statutory requirements, the economic impacts on small entities that participate in the summer flounder fishery. Similarly, the Alternative 1 measures for scup satisfy the requirements of the recently implemented rebuilding plan for that stock. The black sea bass quota in Alternative 1 was selected as a risk-averse measure that will adequately constrain harvest in 2008 and provide continued rebuilding of the overfished stock. Table 5 presents the 2008 initial TALs, RSA, commercial quotas adjusted for RSA, and preliminary recreational harvests for the fisheries under these three quota alternatives.

TABLE 5.—COMPARISON OF THE ALTERNATIVES OF QUOTA COMBINATIONS REVIEWED IN MILLION LB AND METRIC TONS.

	Initial TAL	RSA	2007 Commercial quota overage	Preliminary adjusted commercial quota	Preliminary recreational harvest limit
Quota Alternative 1 (Preferred):					
Summer Flounder .....	15.77 (11,793)	0.233 (106)	0.09 (41)	9.2 (4,187)	10.26 (4,653)
Scup .....	7.34 (7,380)	0.214 (97)	0.62 (283)	4.62 (2,095)	1.83 (830)
Black Sea Bass .....	4.22 (3,629)	0.086 (39)	0.00	2.03 (920)	2.11 (957)
Quota Alternative 2 (Most Restrictive):					
Summer Flounder .....	11.64 (10,700)	0.233 (106)	0.09 (41)	6.75 (3,061)	4.56 (2,068)
Scup .....	5.02 (4,885)	0.151 (97)	0.62 (283)	2.92 (1,324)	1.33 (603)
Black Sea Bass .....	3.75 (3,402)	0.086 (39)	0.00	1.80 (817)	1.87 (848)
Quota Alternative 3 (Status Quo-Least Restrictive):					
Summer Flounder .....	17.112 (13,744)	0.233 (106)	0.09 (41)	10.03 (4,540)	6.75 (3,061)
Scup .....	12.00 (7,484)	0.214 (97)	0.62 (283)	8.32 (3,773)	4.2 (1,905)
Black Sea Bass .....	5.00 (3,719)	0.086 (39)	0.00	2.41 (1,782)	2.51 (1,856)

The revenue decreases associated with the RSA program are expected to be minimal, and are expected to yield important benefits associated with improved fisheries data. It should also be noted that fish harvested under the RSA program would be sold, and the profits would be used to offset the costs of research. As such, total gross revenues to the industry will not decrease substantially, if at all, as a result of this final rule authorizing RSA for 2008.

#### Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is

required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the summer flounder, scup, and black sea bass fisheries. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from NMFS (see **ADDRESSES**) and at the following Web site: <http://www.nero.noaa.gov>.

Dated: December 21, 2007.

**Samuel D. Rauch III,**

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

[FR Doc. 07-6252 Filed 12-26-07; 1:10 pm]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No.050613158-5262-03]

RIN 0648-AT48

#### **Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Extension of Emergency Fishery Closure Due to the Presence of the Toxin that Causes Paralytic Shellfish Poisoning**

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

**ACTION:** Temporary rule; emergency  
action; extension of effective period;  
request for comments.

**SUMMARY:** This action extends a temporary final rule initially published on October 18, 2005. The regulations contained in the temporary rule, emergency action, published on October 18, 2005, and subsequently extended several times at the request of the U.S. Food and Drug Administration (FDA), will expire on January 1, 2008. This temporary rule extends a closure of Federal waters through December 31, 2008. The FDA has determined that current oceanographic conditions and alga sampling data suggest that the northern section of the Temporary Paralytic Shellfish Poison (PSP) Closure Area remain closed to the harvest of bivalve molluscan shellfish and that the southern area remain closed to the harvest of whole or roe-on scallops. NMFS is publishing the regulatory text associated with this closure in this temporary emergency rule in order to ensure that current regulations accurately reflect the codified text that has been modified and extended numerous times, so that the public is aware of the regulations being extended through December 31, 2008.

**DATES:** The amendments to § 648.14 are effective from January 1, 2008, through December 31, 2008. The expiration date of the temporary emergency action published on July 27, 2007 (72 FR

35200), is extended through December 31, 2008. Comments must be received by January 30, 2008.

**ADDRESSES:** Copies of the Small Entity Compliance Guide, the emergency rule, the Environmental Assessment, and the Regulatory Impact Review prepared for the October 18, 2005, reinstatement of the September 9, 2005, emergency action and subsequent extensions of the emergency action, are available from Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930. These documents are also available via the internet at <http://www.nero.noaa.gov/nero/hotnews/redtide/index.html>.

You may submit comments, identified by RIN 0648-AT48, by any one of the following methods:

- Mail: Patricia A. Kurkul, Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930-2298. Mark on the outside of the envelope, "Comments on PSP Closure."

- Fax: (978) 281-9135.

- Electronic Submissions: Submit all electronic public comments via the Federal Rulemaking Portal <http://www.regulations.gov>.

Instructions: 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. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Brian Hooker, Fishery Policy Analyst, phone: (978) 281-9220, fax: (978) 281-9135.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

This emergency closure is being implemented at the request of the FDA after samples of shellfish from the inshore and offshore waters off of the coasts of New Hampshire and Massachusetts tested positive for the toxins (saxotoxins) that cause PSP. These toxins are produced by the alga *Alexandrium fundyense*, which can form blooms commonly referred to as red tides. Current oceanographic conditions and alga sampling data suggest that the northern section of the

Temporary PSP Closure Area remain closed to the harvest of bivalve molluscan shellfish and that the southern area remain closed to the harvest of whole or roe-on scallops. Red tide blooms, also known as harmful algal blooms (HABs), can produce toxins that accumulate in filter-feeding shellfish. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death from PSP.

On June 10, 2005, the FDA requested that NMFS close an area of Federal waters off the coasts of New Hampshire and Massachusetts to fishing for bivalve shellfish intended for human consumption. On June 16, 2005, NMFS published an emergency rule (70 FR 35047) closing the area recommended by the FDA, i.e., the Temporary PSP Closure Area, through September 30, 2005. On July 7, 2005 (70 FR 39192), the emergency rule was modified to facilitate the testing of shellfish for the toxin that causes PSP by the FDA and/or FDA-approved laboratories through the issuance of a Letter of Authorization (LOA) from the NMFS Regional Administrator. On September 9, 2005 (70 FR 53580), the emergency regulation was once again modified by the division of the Temporary PSP Closure Area into northern and southern components. The northern area remained closed to the harvest of all bivalve molluscan shellfish, while the southern component was reopened to the harvest of Atlantic surfclams and ocean quahogs, but remained closed to the harvest of whole or roe-on scallops. The rule was extended as published on September 9, 2005, on October 3, 2005 (70 FR 57517); reinstated on October 18, 2005, (70 FR 60450) to correct a technical error; extended on December 28, 2005 (70 FR 76713); and subsequently on June 30, 2006 (71 FR 37505); January 4, 2007 (72 FR 291); and again on June 27, 2007 (72 FR 35200), through December 31, 2007. On May 18, 2007, the FDA indicated that it could not support the re-opening of the Temporary PSP Closure Area due to insufficient analytical data from the area, and recommended the area remain closed indefinitely. The boundaries of the northern component of the Temporary PSP Closure Area comprise Federal waters bound by the following coordinates in the order stated: (1) 43°00' N. lat., 71°00' W. long.; (2) 43° 00' N. lat., 69° 00' W. long.; (3) 41°39' N. lat., 69° 00' W. long.; (4) 41° 39' N. lat., 71° 00' W. long., and then ending at the first point. Under this emergency rule, this area remains closed to the harvest of Atlantic surfclams, ocean quahogs, and whole or roe-on scallops. The