

### Subpart C—Alternative VIN Requirements in Effect for Limited Period

■ 3. Section 565.23 is amended by revising paragraphs (a) and (g) to read as follows:

#### § 565.23 General requirements.

(a) Each vehicle manufactured in one stage shall have a VIN that is assigned by the manufacturer. Each vehicle manufactured in more than one stage shall have a VIN assigned by the incomplete vehicle manufacturer. Vehicle alterers, as specified in 49 CFR 567.7, shall utilize the VIN assigned by the original manufacturer of the vehicle.

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(g) Each character in each VIN shall be one of the letters in the set: [ABCDEFGHJKLMNPQRSTUWXYZ] or a numeral in the set: [0123456789] assigned according to the method given in § 565.25.

\* \* \* \* \*

Issued: December 11, 2009.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 0908191244–91427–02]

RIN 0648–XR08

#### Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2010 Summer Flounder, Scup, and Black Sea Bass Specifications; Preliminary 2010 Quota Adjustments; 2010 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 2010 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 2010 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 stocks that are currently under rebuilding plans.

**DATES:** Effective January 1, 2010, through December 31, 2010.

**ADDRESSES:** Copies of the specifications document, including the Environmental Assessment (EA), Initial Regulatory Flexibility Analysis (IRFA), and other supporting documents used by the Summer Flounder, Scup, and Black Sea Bass Monitoring Committees and Scientific and Statistical Committee are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New 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, 55 Great Republic 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-Stevenson 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 F targets set forth for each species in the FMP. 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 2010 specifications for these fisheries was provided in the proposed specifications (74 FR 57134; November 4, 2009). That information is not repeated here.

NMFS will establish the 2010 recreational management measures (i.e., minimum fish size, possession limits, and fishing seasons) 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

This final rule implements the specifications contained in the November 4, 2009, proposed rule: A summer flounder Total Allowable Landings (TAL) of 22.13 million lb (10,038 mt) for 2010, inclusive of 663,900 lb (301 mt) set aside for

research. Summer flounder remain under a stock rebuilding program and must achieve the rebuilding biomass target (*i.e.*,  $B_{MSY}$  (Maximum Sustainable Yield)) by January 1, 2013. Analysis conducted by the Southern Demersal Working Group (SDWG) indicates that the 2010 summer flounder TAL implemented by this rule is projected to provide the necessary stock growth to achieve the rebuilding objective within the specified timeframe. This TAL also satisfies a 2000 Federal Court Order (*Natural Resources Defense Council v. Daley*, Civil No. 1:99 CV 00221 (JLG)) which requires the annual summer flounder TAL to have at least a 50-percent probability of success. This TAL has a

50-percent probability of constraining fishing mortality below the management target of  $F_{40\text{ percent}} = 0.255$  and a 95-percent probability of constraining fishing mortality below the overfishing threshold of  $F_{MSY} = F_{35\text{ percent}} = 0.310$ .

Three research projects that would utilize the full summer flounder research set-aside (RSA) of 663,900 lb (301 mt) have been conditionally selected by NMFS and are currently awaiting notice of award. 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**. After deducting the 2010 RSA, the TAL is divided into an

initial commercial quota of 13,278,000 lb (6,023 mt) and a recreational harvest limit of 8,852,000 lb (4,015 mt).

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 2009, plus any previously unaccounted for overages from January–December 2008. Table 1 summarizes, for each State, the commercial summer flounder percent shares as outlined in § 600.100(d)(1)(I), the resultant 2010 commercial quota (both initial and less the RSA), the quota overages as described above, and the final adjusted 2010 commercial quota, less the RSA.

TABLE 1—FINAL STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2010

State	Percent Share	Initial quota		Initial quota, less RSA		2009 Quota overages (through 10/31/09) <sup>1</sup>		Adjusted quota, less RSA	
		lb	kg	lb	kg	lb	kg	lb	kg
ME	0.04756	6,315	2,864	6,126	2,779	0	0	6,126	2,779
NH	0.00046	61	28	59	27	0	0	59	27
MA	6.82046	905,621	410,790	878,452	398,466	31,785	14,417	846,667	398,466
RI	15.68298	2,082,386	944,570	2,019,915	916,233	0	0	2,019,915	916,233
CT	2.25708	299,695	135,942	290,704	131,863	0	0	290,704	131,863
NJ	7.64699	1,015,367	460,571	984,906	446,754	0	0	984,906	446,754
NY	16.72499	2,220,744	1,007,330	2,154,122	977,110	0	0	2,154,122	977,110
DE	0.01779	2,362	1,071	2,291	1,039	55,687	25,259	-53,396	-24,220
MD	2.03910	270,752	122,813	262,629	119,129	0	0	262,629	119,129
VA	21.31676	2,830,439	1,283,887	2,745,526	1,245,371	0	0	2,745,526	1,245,371
NC	27.44584	3,644,259	1,653,036	3,534,931	1,603,445	0	0	3,534,931	1,603,445
Total <sup>2</sup>	100.00	13,278,001	6,022,901	12,879,661	5,842,214	87,472	39,677	12,792,189	5,802,439

<sup>1</sup> 2009 quota overage is determined through comparison of landings for January through October 2009, plus any landings in 2008 in excess of the 2008 quota (that were not previously addressed in the 2009 specifications) for each State. For Delaware, includes continued repayment of overharvest from 2009 and previous years.

<sup>2</sup> Total quota is the sum of all States having allocation. A State with a negative number has a 2010 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 2010 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 2009 summer flounder quota overage (inclusive of overharvest from previous years) is greater than the amount of commercial

quota allocated to Delaware for 2010. As a result, there is no quota available for 2010 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, 2010, landings of summer flounder in Delaware by vessels holding commercial Federal summer flounder fisheries permits are prohibited for the 2010 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 2010 calendar year,

unless additional quota becomes available through a transfer, as mentioned above.

**Scup**

This final rule implements the specifications contained in the November 4, 2009, proposed rule: A 17.09-million-lb (7,752-mt) scup TAC and an 14.11-million-lb (6,400-mt) scup TAL. The TAC is divided into commercial (78 percent) and recreational (22 percent) allocations, in accordance with the FMP; the respective discard estimates are then subtracted to yield the preliminary TAL. After deducting 423,300 lb (192 mt) of RSA for the three conditionally selected research projects, the initial TAL is a commercial quota of 10,675,626 lb (4,842 mt) and a recreational harvest limit of 3,011,074 lb (1,366 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**.

The commercial TAC, discards, and TAL (commercial quota) are 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. 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 2009 periods, plus any previously unaccounted for landings from the 2008 Winter II period. Table 2 presents the final 2010 commercial scup quota for each period and the reported landings for the 2009 Winter I and Summer periods. There were no overages of the 2009 Winter I or Summer Period quotas or previously unaccounted for overages of any 2008 quota periods; therefore, no adjustment to the 2010 scup specifications is required in this final rule. Any overage

of the 2009 Winter II period will be addressed in July 2010, prior to the 2010 Winter II fishery.

Per the quota accounting procedures, after June 30, 2010, NMFS will compile all available landings data for the 2009 Winter II quota period and compare the landings to the 2009 Winter II quota period allocation, inclusive of any transfer from the 2009 Winter I quota period. Any overages will be determined, and deductions, if needed, will be made to the Winter II 2010 allocation and published in the **Federal Register**.

TABLE 2—SCUP PRELIMINARY 2009 COMMERCIAL LANDINGS BY QUOTA PERIOD

Quota period	2009 Quota		Reported 2009 landings through 10/31/09		Preliminary overages as of 10/31/09	
	lb	mt	lb	mt	lb	mt
Winter I .....	3,777,443	1,713	3,758,754	1,402	0	0
Summer .....	2,930,733	1,329	2,876,619	1,073	0	0
Winter II .....	Overage adjustment, if necessary, occurs in 2010					
Total .....	6,708,176	2,502	6,635,373	2,475	N/A	N/A

Table 3 presents the commercial scup percent share, 2010 TAC, projected discards, 2010 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 2010 BY QUOTA PERIOD

	Total allowable catch	Discards	Initial quota	Initial quota less overages (through 10/31/2008) <sup>1</sup>	Adjusted quota less overages and RSA	Possession Limits (per trip) <sup>2</sup>							
						Quota period	Percent share	lb	mt	lb	mt	lb	mt
Winter I .....	45.11	6,013,253	2,728	1,048,537	476	4,964,716	2,252	N/A	N/A	4,815,775	2,184	30,000	13,608
Summer .....	38.95	5,192,113	2,355	905,354	411	4,286,759	1,944	N/A	N/A	4,158,156	1,886	N/A	N/A
Winter II .....	15.94	2,124,834	964	370,509	168	1,754,325	168	N/A	N/A	1,701,695	775	2,000	907
Total <sup>3</sup> .....	100.0	13,330,200	6,046	2,324,400	1,054	11,005,800	4,992	N/A	N/A	10,675,626	4,842	N/A	N/A

<sup>1</sup> See Table 1 for explanation of overages.  
<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 have been in place since 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

TABLE 4—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD—Continued

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	500,000–999,999	227–454	1,500	680	3,500	1,588
2,000	907	1,000,000–1,499,999	454–680	3,000	1,361	5,000	2,268
2,000	907	1,500,000–1,999,999	680–907	4,500	2,041	6,500	2,948
2,000	907	2,000,000–2,500,000	907–1,134	6,000	2,722	8,000	3,629

### Black Sea Bass

This final rule implements the specification contained in the November 4, 2009, proposed rule: A 2.3-million-lb (1,043-mt) black sea bass TAL. This is the *status quo*. The FMP specifies that the annual TAL is allocated 49 percent to the commercial sector and 51 percent to the recreational sector. After deducting 69,000 lb (31 mt) of RSA for the three conditionally selected research projects, the TAL is divided into a commercial quota of 1,093,190 lb (456 mt) and a recreational harvest limit of 1,137,810 lb (516 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 2009, plus any previously unaccounted for landings from January–December 2008. There were no overages for either period; thus, no overage deduction adjustment to the 2010 commercial quota is necessary.

### Comments and Responses

NMFS received 18 comments during the 15-day comment period for the November 4, 2009, proposed rule. The majority of the comments applicable to the proposed specifications pertained to the catch levels recommended by the Council's Scientific and Statistical Committee (SSC) for scup and black sea bass. The majority of the applicable comments submitted raised the same or similar issues; therefore, the significant issues and concerns are summarized and responded to here.

Most comments pertained to a recent NMFS emergency action closure of the recreational black sea bass fishery in the EEZ (74 FR 51092; October 5, 2009). These comments are outside the scope of the proposed specifications and will be considered as comments on the emergency rule. NMFS will take these

comments into consideration if the initial emergency action is extended beyond April 12, 2010, the date on which the 180-day closure is due to expire. NMFS will also take these comments into consideration during the development of the 2010 recreational management measures proposed rule, to be published in the spring of 2010, after the Council deliberates on such measures in early December 2009.

*Comment 1:* Some commenters stated that a 15-day comment period, beginning on the date of the proposed rule publication in the **Federal Register** on November 4, 2009, and ending on November 19, 2009, was too short. One U.S. Representative to Congress specifically requested that NMFS extend the proposed rule comment period beyond 15 days.

*Response:* NMFS has, for the past several years, utilized a 15-day comment period when publishing proposed specifications for summer flounder, scup, and black sea bass in order to ensure that NMFS satisfies a standing court order<sup>1</sup> that requires NMFS to implement the annual specifications for summer flounder effective on or before January 1 of each year. NMFS gave careful consideration to extending the comment period for the proposed 2010 summer flounder, scup, and black sea bass specifications, but determined that extending the comment period would likely jeopardize complying with this court order, as the time required to address comments, develop, and publish a final rule would not occur before January 1. Were specifications not in place for scup and black sea bass on January 1, no quotas would be established, nor would trip limits be in place for scup. Absence of quotas for the commercial fisheries was determined to be inconsistent with the goals and objectives of the FMP that are designed to prevent overfishing by establishment of both trip limits and a total quota level for the year that is related to an overall mortality objective

for the stocks. A situation wherein there were no quotas established would allow uncontrolled harvest and prevent NMFS from enforcing possession limits or, if necessary, closing the fishery to ensure catch levels were not exceeded. Therefore, NMFS has determined that a 15-day comment period is reasonable under these circumstances.

*Comment 2:* Some commenters stated that the proposed rule only contained tables detailing commercial fishery quotas and that recreational anglers were disadvantaged by not being able to comment, presumably on the quotas for the recreational fishing sector.

*Response:* The proposed rule contains clear text descriptions of the proposed recreational harvest limit values and invites comment on all proposed measures. These values are not presented in tabular form because, unlike the commercial quotas, the recreational harvest limits are not subdivided into State allocations or fishing period allocations, and do not have applicable possession limits established through the specifications rule.

The November 4, 2009, proposed rule provided notice that the rule pertains to the 2010 proposed specifications, which are described as the commercial quotas and commercial management measures, such as trip limits, and the proposed 2010 recreational harvest limits. The proposed rule further clarified that the Council will consider recreational management measures (*i.e.*, minimum fish sizes, possession limits, and fishing seasons) at its December 2009 meeting.

The proposed 2010 recreational harvest level for summer flounder is found in the text on page 57136 of the November 4, 2009, proposed rule in the second paragraph of the third column; the proposed recreational harvest limit for scup is found in the text on page 57138 in the first paragraph of the second column; and the proposed recreational harvest limit for black sea bass is found in the text on page 57139 in the third paragraph of the first column.

<sup>1</sup> *North Carolina Fisheries Assoc. Inc. et al. v. Daley* Civil NO. 2:97cv339 (RGD).

*Comment 3:* Several commenters suggested that NMFS has misinterpreted requirements of the Magnuson-Stevens Act that Councils develop annual catch limits for each of their managed fisheries that may not exceed the fishing level recommendations of their SSC. One commenter stated that a citation to this aspect of the Magnuson-Stevens Act section 302(h)(6) in the proposed rule, and previous statements by NMFS personnel that the 2010 catch levels could not exceed the Acceptable Biological Catch (ABC) levels recommended by the Council's SSC, purposefully and egregiously misled the public and, by inference, the Council, that the ABC represented a hard ceiling of catch levels that the Council could not exceed in recommending specification levels. In support of these commenters' positions, some referenced an October 22, 2009, letter from NOAA Administrator Dr. Jane Lubchenco to U.S. Senator Olympia Snowe, wherein Dr. Lubchenco stated, in regard to Atlantic herring, "Because Atlantic herring is not subject to overfishing, a mechanism for specifying annual catch limits (ACLs) does not need to be implemented until 2011." The commenters reason that, by the logic in this statement, the Council could have recommended catch levels (*i.e.*, specifications) higher than the ABC levels recommended by the SSC, and that NMFS's advice to the contrary was incorrect.

*Response:* NMFS agrees that, for stocks not subject to overfishing, ACLs need not be established until 2011 and that there are not ACL mechanisms in the summer flounder, scup, or black sea bass regulations; however, the requirement that SSCs establish annual ABCs became effective when the Magnuson-Stevens Act was reauthorized in 2007. The SSC recommendation is a thorough scientific review process which examines best available scientific information. In order to be approvable, all actions taken under the Magnuson-Stevens Act must be consistent with all 10 National Standards, as well as applicable law. National Standard 2 requires that conservation and management measures shall be based on the best scientific information available. Thus, even in the absence of ACLs, were a Council inclined to ignore the ABC advice of its SSC and set catch levels higher than the recommended ABC level, substantial explanation and documentation would be necessary to substantiate why the SSC's ABC recommendation did not reflect the best scientific information available and to demonstrate that doing

so is consistent with National Standard 2. Dr. Lubchenco's letter to Senator Snowe contains the following important information which was not cited by the commenters:

\* \* \* effective in January 2007, the Magnuson-Stevens Act enhanced the role of SSCs, mandating that they shall provide ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch (Magnuson-Stevens Act § 302(g)(1)(B)). We [NMFS] have advised the Council that their recommendations for Atlantic herring catch limits will have to fully consider all Magnuson-Stevens Act requirements, including preventing overfishing (National Standard 1) and using best scientific information available (National Standard 2).

The Council has provided a catch recommendation for 2010 consistent with the ABC recommendation of its SSC; no alternative catch levels have been recommended. Thus, through this final rule, NMFS is implementing the 2010 recommendations of the Council, consistent with National Standard 2.

*Comment 4:* Several comments stated that the Council must direct its SSC to reconsider the 2010 ABCs for scup and black sea bass. Among the issues raised by the commenters were allegations that the SSC ignored all but the most precautionary statements of the 2008 Data Poor Stocks Working Group (DPSWG) peer-reviewed assessment for the two species, that the SSC overstepped its bounds and acted inappropriately setting the 2010 ABC with too much precaution, that the circumstances surrounding the 2009 ABC for black sea bass were not adequately considered (*i.e.*, the stock conditions for the 2009 recommendation were significantly different than for the 2010 recommendation), and that both species stocks are rebuilt, not overfished, nor experiencing overfishing, and that NMFS must increase the quotas above the level recommended by the SSC and, subsequently, the Council.

*Response:* The Council considered a motion to require the SSC to reconvene and reconsider its 2010 scup and black sea bass ABC recommendations during its August 2009 meeting in Alexandria, VA. The motion failed. The SSC is a formal standing committee of the Council, and only the Council may ask the SSC to reconvene or reconsider its recommendations. NMFS does not have the authority to task the SSC to convene or consider specific topics.

As indicated in numerous comments, NMFS agrees that the stock status for both scup and black sea bass are much improved based on the results of the DPSWG assessments and 2009 stock

assessment updates. As stated, both stocks are rebuilt and not experiencing overfishing. The revised National Standard 1 guidance (74 FR 51092; January 16, 2009) contemplates the type of situation that has occurred for the 2010 ABC recommendations for scup and black sea bass: In situations where there are large amounts of either scientific or management uncertainty, or a combination of both, catch levels should be reduced from the overfishing level by an amount that adequately compensates for the uncertainties. The SSC had a thorough, deliberative discussion in making the 2010 ABC recommendations for scup and black sea bass, and best available scientific information regarding stock status was not ignored. Instead, the SSC found the statements from the DPSWG and the peer-review panel on the level of scientific uncertainties associated with the new assessments and the suggestions to proceed cautiously in increasing catches for either stocks compelling (See Northeast Fisheries Science Center Reference Documents 09-02a (DPSWG final report), 09-16 (2009 black sea bass stock status update), and 09-18 (2009 scup stock status update), all available at <http://www.nefsc.noaa.gov> for more information). For both stocks, the SSC expressed numerous concerns with the reliability and accuracy of the information that the new stock assessment models provide for making catch recommendations. The SSC recommendations, though conservative, are consistent with the National Standard 1 Guidelines (74 FR 3178; January 16, 2009), all of the other National Standards, and the FMP.

*Comment 5:* Several commenters stated that no catch levels should be implemented for scup and black sea bass until such time that the Council's revised ABC recommendation standard operating procedures, which will change the way the Monitoring Committee and SSC operate in making specification recommendations to the Council, are applied to the 2010 recommendations.

*Response:* NMFS does not agree that catch limits, through the specifications in this final rule, should not be implemented until the Council has directed its Monitoring Committees and SSC to reconsider the 2010 ABC recommendations. The process wherein the SSC and Monitoring Committees provided advice on scientific and management uncertainty, respectively, in setting 2010 ABC occurred as contemplated both by the Magnuson-Stevens Act, the Council's standard operating procedures as drafted in July

2009, and as outlined in the implementing regulations of the FMP. In the interim since the 2010 ABC recommendations were made, the Council has modified its standard operating procedures for the ABC recommendation process, and it is noted that the Monitoring Committee disagreed with the SSC's black sea bass 2010 ABC recommendation. However, the process did produce a vetted Council recommendation for 2010 catch levels for all three species. Some commenters have indicated that, had the current advice regarding the Council's ability to set catch levels higher than the ABC recommended by the SSC been available, the Council recommendations may have been different (*See* Comment and Response 3 for additional discussion). To date, the Council has not directed either its Monitoring Committee or its SSC to reconsider the proposed specifications for 2010; therefore, NMFS must act on the current recommendations of the Council, as submitted. In this case, NMFS has determined that the catch recommendations forwarded from the Council for 2010 are consistent with the Magnuson-Stevens Act, other applicable law, and the FMP.

*Comment 6:* Some comments stated that the proposed 2010 catch levels for scup and black sea bass, if implemented, would violate National Standard 1 because they would fail to achieve, on a continuing basis, optimum yield (OY). These comments further elaborate that there are currently no conservation issues with the scup or black sea bass stocks (*i.e.*, rebuilding programs or the need to end overfishing), so the fisheries must be managed to attain OY to provide the greatest benefit to the Nation. Some comments point toward the OY value for the southern stock of black sea bass, as managed in the Snapper-Grouper FMP in the South Atlantic, to make inferences that the northern stock catch for 2010 is being set well below the southern stock's OY.

*Response:* The commenters have misinterpreted the application of National Standard 1. NMFS interprets "achieving on a continual basis" to mean producing a long-term series of catches such that the average catch is equal to OY, overfishing is prevented, and long-term average biomass is near or above  $B_{MSY}$ . As such, National Standard 1 does not contemplate that the OY will necessarily be achieved in a single year given the natural fluctuation of fish stocks in response to environmental conditions. In the opinion issued by Judge Robert Doumar in *North Carolina Fisheries Assoc. Inc.*

*et al. v. Daley* Civil NO. 2:97cv339 (RGD), the Court found the following in response to the plaintiff's allegation that a quota did not achieve OY for the 1997 fishing year:

"\* \* \* The District of Columbia Circuit has defined optimum yield as "maximum yield less whatever amount need be conserved for economic, social or ecological reasons."<sup>2</sup> This Court has also held that "optimum yield is not the same as 'maximum yield.'"<sup>3</sup> Furthermore, optimum yield is measured on a continuing basis, the optimum yield from each fishery, not the optimum yield in a single year."

Further complicating the arguments presented by commenters is the fact that OY for black sea bass and scup in the Mid-Atlantic region have not been specified as a specific amount based on a reduction of MSY by relevant economic, ecological, and social factors. Under the Magnuson-Stevens Act OY is less than or equal to MSY proxy. While OY is a requirement for all FMPs, to date, information of sufficient quality has not been available to specify MSY or OY for scup or black sea bass. Instead, an MSY proxy has been used for these stocks and the Council has not modified the proxy to specify an OY different from it. The Council will re-evaluate OY specifications for its managed species as part of the Omnibus Amendment being developed to implement ACLs.

It is inappropriate to assume that the OY value of the southern stock of black sea bass is at all informative as a comparison for the northern stock, as was done by a number of the commenters. The species is the same, but the stocks are distinct in many ways and, as such, the MSY and OY values would be expected to differ.

NMFS acknowledges that the 2010 catch level recommendations from the Council, as implemented in this final rule, are conservative relative to the  $B_{MSY}$  values for the two stocks; however, the SSC provided clear rationalization for its 2010 ABC recommendation.

The National Standard 1 guidelines (74 FR 3178; January 16, 2009), contemplate reducing catch levels from OY in situations where the uncertainties pertaining to the fishery necessitate so doing. Response to Comment 35 (page 3190 of the January 16, 2009, rule, 74 FR 3178) states,

"NMFS believes that fisheries managers cannot consistently meet the requirements of the Magnuson-Stevens Act to prevent

overfishing and achieve, on a continuing basis, OY unless they address scientific and management uncertainty. The reductions in fishing levels that may be necessary in order to prevent overfishing should be only the amount necessary to achieve the results mandated by the Magnuson-Stevens Act. Properly applied, the system described in the guidelines does not result in 'too many deductions,' but rather, sets forth an approach that will prevent overfishing, achieve on a continuing basis OY, and incorporate sufficient flexibility so that the guidelines can be applied in different fisheries."

Further, the National Standard 1 guidelines, (74 FR 3178; January 16, 2009) on page 3208 in (v) *Specification of OY* states:

"If the estimates of MFMT [Maximum Fishing Mortality Threshold] and current biomass are known with a high level of certainty and management controls can accurately limit catch then OY could be set very close to MSY \* \* \* To the degree that such MSY estimates and management controls are lacking or unavailable, OY should be set further from MSY. If management measures cannot adequately control fishing mortality so that the specified OY can be achieved without overfishing, the Council should reevaluate the management measures and specification of OY so that the dual requirements of NS1 [National Standard 1] (preventing overfishing while achieving, on a continual basis, OY) are met."

In this instance, the SSC has indicated that substantial uncertainty exists in the new stock assessments for both scup and black sea bass. The biomass estimates provided by the stock assessment are uncertain, as are the MFMT or overfishing threshold levels calculated, as this is the first year of fishing under the information provided by the new assessment methodology and outputs. By inference, the SSC may have been concerned that there is a likelihood that overfishing could occur if catch levels are set too high. The perception from the updated assessments is that both stocks are well above the respective overfishing thresholds; however, the SSC has provided for conservative catches in 2010 in an effort to validate the information provided by the new, as of yet untested, stock assessments. This is a reasonable approach, and consistent with the guidance on setting catches relative to OY/MSY proxy. Presumably, if the stock assessment information is validated by the 2010 catches, overfishing does not occur, and the new model framework performs as expected in response to the 2010 fishing activities, the future management response and catch recommendations could be to increase catches and to move long-term average catches toward OY/MSY proxy levels. Conversely,

<sup>2</sup> *C&W Fish Co., Inc. v. Fox*, 289 U.S. App. DC 323, 931 F2d 1556, 1563 (DC Cir. 1991).

<sup>3</sup> *J.H. Miles & co. v. Brown*, 910 F. Supp. 1138,1148 (E.D. Va. 1995).

should the updated stock assessment information indicate that the 2010 fishery levels were either too high, the stock information overly optimistic, the MFMT inaccurate, or the stock to be subject to overfishing, the response may be more conservative management in the future until such time that these issues may be resolved. If the confidence in the most recent stock assessments for both species does not improve over time, the Council should consider setting OY below the MSY proxy levels so that the long-term average desired yield is achieved on a continuing basis.

*Comment 7:* Some commenters did not support the use of RSA in 2010, stating that the 3-percent set aside would be better applied to the recreational fisheries. Specifically, one commenter disagreed with the awarding of RSA to fund a near-shore trawl survey project, stating that NMFS should be obligated to provide funding for and/or conduct near-shore surveys.

*Response:* NMFS continues to support the use of RSA as a means for the Council and the agency to cooperatively fund research that meets the identified research priorities of the Council. The RSA project selection and approval process is not part of the specification rulemaking process. Inclusion of those projects that have been given a preliminary approval for 2010 RSA award in the proposed rule is done to solicit comment on Exempted Fishing Permits (EFPs) that may be awarded at a later date to support the described research and compensation fishing activities. No specific exceptions to the proposed EFPs were raised in the comments on the proposed rule; rather, the comments are geared toward specific projects that have been preliminarily identified for 2010 RSA award and the overall goals and objectives of the RSA program. NMFS and the Council work cooperatively each year to identify research priorities and to determine which submitted proposals should be selected for eventual RSA funding through the NOAA Grants award process. The commenter's letter has been forwarded to both the Northeast Fisheries Science Center (NEFSC) and the Council's Research Steering Committee, as these groups are involved in the annual RSA project selection process and are better suited to address the concerns raised.

#### 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, to ensure that the final specifications are in place on January 1, 2010. 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 that is developed by the Council. This document was received by NMFS in mid-September 2009. 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. The proposed rule published on November 4, 2009, with a 15-day comment period ending November 19, 2009. Publication of the adjusted summer flounder quota at the start of the fishing year that begins January 1, 2010, is required by the order of Judge Robert Doumar in *North Carolina Fisheries Association v. Daley*.

If the 30-day delay in effectiveness were not waived, the lack of effective quota specifications on January 1, 2010, would present significant difficulties to both NMFS and individual States who manage these species cooperatively through the Commission. The summer flounder, scup, and black sea bass fisheries are all expected, based on historic participation and harvest patterns, to be very active at the start of the fishing season in 2010. Individual States would be unable to set commercial possession and/or trip limits, which apportion the catch over the entirety of the calendar year. NMFS would be unable to control harvest in any way, as there would be no quotas in place for any of the three species until the regulations are effective. NMFS would be unable to control harvest or close the fishery should landings exceed the quotas. In addition, the Delaware summer flounder fishery would be open for fishing, but in a negative quota situation. All of these factors would result in a race for fish wherein uncontrolled landings would occur. Disproportionately large harvest occurring within the first weeks of 2010 would have distributional effects on other quota periods, and would disadvantage some gear sectors or owners and operators of smaller vessels that typically fish later in the fishing season. There is no historic precedent

by which to gauge the magnitude of harvest that might occur should quotas for these three species not be in place during the first weeks of 2010. It is reasonable to conclude that the commercial fishing fleet possesses sufficient capacity to exceed the established quotas for these three species before the regulations would become effective, should quotas not be in place on January 1, 2010. Should this occur, the fishing mortality objectives for all three species and the summer flounder rebuilding plan would be compromised.

This final rule is exempt from review under Executive Order 12866.

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

This FRFA was prepared pursuant to 5 U.S.C. 604(a), and incorporates the IRFA and a summary of the analyses completed to support the action. No significant issues were raised by the public comments in response to the IRFA. 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*

No changes to the proposed rule were required to be made as a result of public comments. None of the comments received raised specific issues regarding the economic analyses summarized in the IRFA. 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 2009 quotas could affect 2,213 vessels

that held a Federal summer flounder, scup, and/or black sea bass permit in 2008, the most recent year for which complete permit data exist. The more immediate impact of this final rule will likely be felt by the 808 vessels that actively participated (*i.e.*, landed these species) in these fisheries in 2008.

*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 changes in year-to-year quota specifications may be offset by adjustments to such measures as commercial fish sizes, changes to mesh sizes, gear restrictions, or possession and trip limits that may increase efficiency or value of the fishery. For 2010, 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. In particular, the Council's SSC has made recommendations for the 2010 ABC level for all three stocks. NMFS considers this recommendation to be consistent with National Standard 2. Establishment of catch levels higher than the SSC ABC recommendations would require substantial, compelling argument and documentation that the recommendations were not, in fact, based on the best available scientific information. NMFS-approved measures for the summer flounder fishery must also ensure that the statutory requirements of the stock rebuilding program are met by the January 1, 2013, rebuilding deadline.

The economic analysis for the 2010 specification assessed the impacts for quota alternatives that achieve the aforementioned objectives. The no

action alternative, wherein no quotas are established for 2010, 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 2010 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 fishing limits for 2010, and could result in overfishing of the resources and substantially compromise the mortality and/or stock rebuilding objectives for each species.

Furthermore, Alternative 2 from the Council's analysis contains the most restrictive TAL options (*i.e.*, the lowest catch levels). While this alternative would achieve the required objectives for all three species, it carries the highest potential negative impact on small entities in the form of foregone fishing opportunity. Alternative 2 was not preferred by the Council or NMFS because other alternatives considered have lower impacts on small entities while achieving the stated objectives of the 2010 specification process.

Alternative 3 (least restrictive quotas; highest catch levels) would produce the smallest impact on small entities. For all three species, the respective quotas under Alternative 3 are inconsistent with the SSC's catch level recommendations. For summer flounder, the Alternative 3 measures do not achieve the objectives required under the summer flounder rebuilding program. Because the respective Alternative 3 measures would establish annual fishing limits that exceed the fishing level recommendations of the Council's SSC, they are inconsistent with the Magnuson-Stevens Act requirements and cannot be implemented for 2010, despite having the lowest associated impact on small entities.

Through this final rule, NMFS implements the summer flounder, scup, and black sea bass TALs contained in Alternative 1, the Council's preferred alternatives, which consist of the quota alternatives that pair the lowest economic impacts to small entities and meet the required objectives of the FMP and the Magnuson-Stevens Act. Relative to 2009, the 2010 commercial quotas and recreational harvest measures in this action would result in the following TAL changes for the commercial and recreational sectors:

(1) A 19.9-percent increase for summer flounder;

(2) A 26.2-percent increase for scup; and

(3) Status quo for black sea bass.

The respective TALs contained in Alternative 1 for all three species were selected because they satisfy 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 F rates associated with the TALs for all three species all have very low likelihoods of causing overfishing to occur in 2010. TAL Alternative 1 for summer flounder is also projected to provide the necessary continued stock rebuilding to achieve the  $SSB_{MSY}$  by the rebuilding period ending date of January 1, 2013.

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 2010.

*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 16, 2009.

**Samuel D. Rauch III,**

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

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