

Required Determinations

The Service has examined this regulation under the Paperwork Reduction Act of 1995 and found it to contain no information collection requirements. This rulemaking was not subject to review by the Office of Management and Budget under Executive Order 12866.

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Author

The primary author of this final rule is Mr. J. Allen Ratzlaff, Asheville Field Office, (See ADDRESSES section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.12(h) is amended by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.
* * * * *
(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS:							
* <i>Helianthus eggertii</i>	* Sunflower, Eggert's	* U.S.A. (AL, TN, KY).	* Asteraceae	* T	* 613	* NA	* NA
*	*	*	*	*		*	

Dated: April 8, 1997.
John G. Rogers,
Acting Director, Fish and Wildlife Service.
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 960805216-7111-06; I.D. 121796B]

RIN 0648-AH06

Fisheries of the Northeastern United States; Regulatory Amendment to the Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Commercial Quota Harvested for Delaware and New Hampshire

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

ACTION: Final rule; commercial quota harvest.

SUMMARY: NMFS issues this final rule to implement approved measures contained in a regulatory amendment to the Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries (FMP). This regulatory amendment revises the allocation and management of the commercial scup quota. As a consequence of this rule, NMFS further announces that no commercial scup quota is available for the States of Delaware and New Hampshire for the 1997 Summer period, which ends October 31, 1997.

EFFECTIVE DATE: May 20, 1997.

ADDRESSES: Copies of the regulatory amendment are available upon request from David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901.

Comments regarding burden-hour estimates for collection-of-information requirements contained in this final rule should be sent to Andrew A. Rosenberg,

Ph.D., Regional Administrator, 1 Blackburn Drive, Gloucester, MA 01930, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20502 (Attention: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Regina L. Spallone, Fishery Policy Analyst, 508-281-9221.

SUPPLEMENTARY INFORMATION: This final rule implements approved measures contained in the regulatory amendment to the FMP, which was prepared by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission). Background concerning the development of this regulatory amendment was provided in the notice of proposed rulemaking (62 FR 5375, February 5, 1997), and is not repeated here.

This rulemaking revises the manner in which the annual commercial quota is allocated to the scup fishery. With this revision, the total annual allowable catch (TAC) for the commercial fishery

is allocated into two Winter periods: January–April (Winter I) and November–December (Winter II); and one Summer period: May–October (Summer). Based on historical landings data, the quota is allocated to each period as follows: Winter I—45.11 percent; Summer—38.95 percent; and Winter II—15.94 percent. Discard estimates for each period are subtracted from the TAC for each period to derive the commercial quota for each period. The quota for each of the two Winter periods is allocated on a coastwide basis to the coastal states from Maine to North Carolina. During these Winter periods, coastwide landings (trip) limits, recommended by the Council and Commission as part of the annual fishing measures and implemented by the states, are in effect. This regulatory amendment specifies that during the 1997 Winter II period, the landings limit will be 12,000 lb (5,443 kg) for vessels with a Federal scup moratorium permit. During the Summer period, the quota is distributed among the coastal states based on the percentage shares specified in this regulatory amendment. The states are responsible for the management of their respective quotas.

Disapproved Measure

NMFS announces the disapproval of the *de minimus* provision specified in this regulatory amendment because it violates national standard 7, raises questions of consistency with national standard 1, and appears to be arbitrary and capricious. This measure would require an annual examination of state landings to determine if a state should be granted *de minimus* status. *De minimus* is defined as landings in a state during the Summer period that are less than 0.1 percent of the overall Summer quota. This determination was to be based on landings for the last preceding year for which data are available. The *de minimus* measure imposes an administrative burden and cost without conferring any demonstrable administrative or conservation benefit. Consequently, this provision contravenes the requirements of national standard 7.

In the preamble to the proposed rule to implement this regulatory amendment, NMFS noted that the *de minimus* provision was unclear and invited comments specific to the operation of this provision. The Council and the State of Delaware's Division of Fish and Wildlife submitted comments to interpret the provision. However, the comments did not address NMFS' concern that it is not clear from the record if a *de minimus* state must close its state fishery when its quota is harvested. A state's failure to close its fishery when its quota is harvested would prevent the attainment of the exploitation rate reduction goals in the FMP, since vessels without Federal permits fishing exclusively in that state's waters could continue to land scup. This would result in overfishing and renders the measure inconsistent with national standard 1.

If *de minimus* status does not, at the very least, require a state to impose landing constraints, the provision would encourage owners of vessels that have not traditionally landed in that state to land amounts of scup much larger than they could land in their home port states. This could result in the state's *de minimus* quota being rapidly exceeded and compound the overfishing situation if a *de minimus* state is not required to close its fishery when its *de minimus* quota is harvested.

Further, the standard established to determine *de minimus* status (examination of landing data for the last year for which data are available) appears arbitrary and capricious. Landings in the intervening time period in the state under consideration for *de minimus* status could well exceed the threshold for such status. Thus, such a determination would not reflect accurately the true status of the state.

Last, the *de minimus* provision submitted by the Council and Delaware included measures that went beyond the scope of measures taken to public hearing. For instance, the Council suggested prohibiting scup landings by any federally permitted vessels in a state granted *de minimus* status. To implement this provision at this point

would be inconsistent with the Administrative Procedure Act because the public has had no opportunity to participate in this measure's development or to comment on it. Also, note that Table 2 in this final rule lists the states and their percent shares for the Summer period commercial quota. These percent shares are the same as were listed in the proposed rule. However, had the *de minimus* provision been approved, these percent shares would have changed.

Approved Measures: Implementation of the Revised Quota System

A coastwide commercial quota for scup was implemented on January 1, 1997. Final specifications, effective March 11, 1997 (62 FR 12105, March 14, 1997), apportioned a quota of 6.0 million lb (2.7 million kg) to the commercial scup fishery. This quota was derived by subtracting an estimated 1997 discard of 1.103 million lb (0.5 million kg) from the 7.103 million lb (3.2 million kg) allocated to the commercial sector. This regulatory amendment specifies that any quota harvested between January 1, 1997, and April 30, 1997, will count against the Winter I allocation. Any landings in excess of the 1997 Winter I allocation will be deducted from the allocation for the 1997 Winter II period. Landings in excess of the total of both 1997 Winter periods will be deducted from 1998 Winter periods. This deduction would not affect the Summer allocation in either year. However, current data show approximately 800,000 lb (362,874 kg) have been landed through March 22, 1997. Therefore, an overage of the Winter I allocation, specified in the table below, would be unlikely. As such, no adjustment is necessary to the Winter II allocation. However, if additional data become available that show landings during this time are in excess of the Winter I allocation, an adjustment will be made and the public informed through notification in the **Federal Register**.

A summary of the 1997 allocations for the three periods is shown in Table 1.

TABLE 1.—PERIOD ALLOCATIONS OF COMMERCIAL SCUP QUOTA

Period	Percent	TAC ¹	Discards ²	Quota allocation	
				(pounds)	(kilograms) ³
WINTER I	45.11	3,204,163	497,563	2,706,600	1,227,693
SUMMER	38.95	2,766,619	429,619	2,337,000	1,060,045
WINTER II	15.94	1,132,218	175,818	956,400	433,816
TOTAL	100.00	7,103,000	1,103,000	6,000,000	2,721,554

¹ Total Allowable Catch, in pounds.

² Discard estimates, in pounds.

³ Kilograms are as converted from pounds.

The 1997 commercial quota for the Summer period (2,337,000 lb; 1,060,045

kg), apportioned among the states according to the percentage shares

specified in § 648.120(d)(3), is presented in Table 2.

TABLE 2.—SUMMER PERIOD (MAY–OCTOBER) COMMERCIAL QUOTA SHARES

State	Share (percent)	1997 allocation	
		(pounds)	(kilograms) ¹
Maine	0.13042	3,048	1,383
New Hampshire	0.00004	1	0
Massachusetts	15.49117	362,029	164,214
Rhode Island	60.56588	1,415,425	642,026
Connecticut	3.39884	79,431	36,029
New York	17.05295	398,527	180,769
New Jersey	3.14307	73,453	33,318
Delaware	0.00000	0	0
Maryland	0.01288	301	137
Virginia	0.17787	4,157	1,886
North Carolina	0.02688	628	285
Total	100.00000	2,337,000	1,060,045

¹ Kilograms are as converted from pounds and do not add to the converted total due to rounding.

Section 648.121(b) requires the Administrator, Northeast Region, NMFS (Regional Administrator) to monitor the Summer period state commercial quotas and determine the date when a state commercial quota is harvested. NMFS is required to publish notification in the **Federal Register** advising a state and notifying vessel and dealer permit holders that, effective upon a specific date, a state's Summer period commercial quota has been harvested and that no Summer period commercial quota is available for landing scup in that state for the remainder of the period. Because the amount of commercial quota that is allocated for the Summer period to the State of New Hampshire is 1 lb (less than 1 kg) and to the State of Delaware is 0 lb (0 kg), the Regional Administrator has determined that no quota is available for landings in those states for the Summer period.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land scup in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours May 20, 1997, until 2400 hours, October 31, 1997, landings of scup in New Hampshire or Delaware by vessels holding commercial Federal fisheries permits are prohibited, unless quota becomes available through a transfer and is announced in the **Federal Register**. Federally permitted dealers are also advised that they may not purchase scup from federally permitted vessels that land in New Hampshire or Delaware for the remainder of the

Summer period or until quota becomes available through a transfer.

Comments and Responses

Written comments from the Commonwealth of Massachusetts Division of Marine Fisheries (MA-DMF); the Commonwealth of Massachusetts Executive Office of Environmental Affairs, Office of Coastal Zone Management (MA-OCZM); the State of Delaware Division of Fish and Wildlife (Delaware); the Council; three fishing industry associations; one U.S. Congressman; and six members of the public were received during the public comment period, which ended on March 7, 1997. One association letter was accompanied by a petition that was signed by 314 individuals. Several written comments were also received during the public comment period that were not relevant to the proposed rule for this regulatory amendment. Those comments are not addressed here.

Comment: Delaware and the Council submitted a comment to explain the *de minimus* provision. Specifically, Delaware interpreted the provision to include the following points, and the Council concurred: (1) *De minimus* status would be valid for 1 year; (2) *de minimus* quota would be equal to 0.1 percent of the coastwide summer total and that amount would be subtracted from the remainder prior to allocation to the other states; (3) no landings of scup would be permitted by federally permitted fishing vessels in states granted *de minimus* status; (4) to apply for *de minimus* status, a state must show "reasonable steps" were taken to assure landings would not exceed its *de minimus* allocation; (5) landings in

excess of a *de minimus* state's allocation would be taken off next year's allocation; (6) states granted *de minimus* status would submit an annual report to the Monitoring Committee, the Council, and the Board, detailing scup landings and compliance.

Response: For the reasons noted in the preamble of this final rule, NMFS has disapproved the provision to grant *de minimus* status to states. As noted in the preamble, the clarification submitted did not clarify adequately the measures and actually raised new concerns about the provision.

Comment: One industry association urged disapproval because of the rapid pace used to develop the quota measure. The association felt that there was inadequate time for constructive discussion of the alternatives.

Response: Amendment 8 to the FMP, approved on July 29, 1996 (61 FR 43420, August 23, 1996), stressed the Council's intention to revise the coastwide commercial quota allocation system contained within it. Since the Council contemplated revisions in Amendment 8, those changes are promulgated through this regulatory amendment, instead of a plan amendment. However, a regulatory amendment does not exempt an action from full public participation afforded under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Public hearings for this regulatory amendment were held from September 10, 1996,

through September 12, 1996, in coastal communities from Buzzards Bay, MA, to Cape May Courthouse, NJ. This schedule of hearings invited widespread public input into the development of the regulatory amendment, including its alternatives. This schedule is entirely consistent with the legal requirements that pertain to the fishery management plan development process.

Comment: Two commenters urged disapproval of the regulatory amendment as inconsistent with national standard 4. One U.S. Congressman recommended disapproval of the regulatory amendment because of the Summer allocations to the states and his concern about the Massachusetts allocation. One individual requested that NMFS disapprove the regulatory amendment, because he feels it is based on inaccurate data, fails to address differing discard rates by gear type, and imposes no effort control on gear types with high discard rates. This commenter believes that national standard 4 is violated by both the coastwide quota approved under Amendment 8 to the FMP and this regulatory amendment.

Response: For the reasons noted in this preamble, NMFS determined all measures except *de minimus* to be consistent with the national standards and all other applicable laws. NMFS disagrees that annual allocations, or their distribution in either Amendment 8 or this regulatory amendment, violate national standard 4. For the most part, the distribution of the allocations is on a coastwide basis. During the Winter period coastwide quotas, all industry participants will operate under uniform landings limits regardless of where they are fishing or in which state they reside. A coastwide quota does not have a discriminatory effect between residents of different states, as such a measure is indifferent to the location of the fishing effort that results in its harvest. While many would like to see higher annual quotas, that desire conflicts with the conservation goals established in Amendment 8, which are consistent with the principal focus of the Magnuson-Stevens Act to prevent overfishing and to rebuild overfished stocks, of which scup is one. This approach to management does not raise any issues with respect to national standard 4. Further, the state-by-state quota system in the Summer period established by this regulatory amendment is equally consistent with national standard 4.

National standard 4 requires that any allocation be fair and equitable to all participants in the fishery. This requirement does not translate into a management scheme in which all state

quotas have to be the same or similar. The fair and equitable aspect of national standard 4, as applied to this regulatory amendment, relates to the manner in which the allocation is assigned to the states. In this instance, during the Summer period, the assignment of the quota to the states is based on the same formula. Each state receives a percentage of the quota based on the percentage of the overall catch represented by the states' landings data from 1983 through 1992. The states are going to share the quota differently since their historical percentage of the overall landings are different. The historical landings data are the best available data upon which to base the allocation system. Use of these data is consistent with the requirements of national standard 2. Further, the regulatory amendment specifies that those percentages may be revised if additional data are provided to indicate that a state's landings data were incomplete.

This regulatory amendment cannot impose effort control on gear types with high discard rates because at the present time such information is not available for analysis. The issue is addressed elsewhere in this preamble.

Comment: Two industry associations expressed their belief that the data available are inadequate for use as a basis for management.

Response: NMFS disagrees that available data are not sufficient to support the measures in this regulatory amendment. The measures rely upon the best scientific data available from both NMFS and the states. While data are lacking for certain elements of this fishery—notably landings from some states' inshore handline fisheries—this regulatory amendment does contain the provision to allow states to revise their summer shares based on amended data for the historical period. Further, if gear-specific data become available, that data could be reflected in the annual quota calculation.

Comment: The MA-DMF commented that the regulatory amendment violates national standard 9 because it fails to reduce bycatch.

Response: To begin addressing discards in the scup fishery, and bycatch of scup in other fisheries, the final specifications for the 1997 scup fishery revised gear requirements for the commercial sector of this fishery. Specifically, the minimum codend mesh for otter trawl vessels was increased to 4.5 inches (11.43 cm), triggered by the harvest of a threshold of 4,000 lb (1,814 kg) from November through April, and 1,000 lb (453 kg) from May through October. The intent of this measure is to

encourage offshore vessels that target squid with 1.875 inch (4.76 cm) mesh, to move off concentrations of scup, unless the vessel intends to continue fishing with the larger mesh. As the regulatory amendment calls for discards to be subtracted from a period's TAC, there is further incentive to discard less, as lower levels of discards could also be reflected in the annual quota calculation. This approach is consistent with national standard 9 that directs, in part, that to the extent practicable, bycatch should be minimized.

Comment: One industry association expressed concern about the adequacy of data available to estimate discards (referring to the estimate as "subjective") and also about the methods for using those data in calculating the quotas.

Response: Since the estimate of scup discards are the best available data at this time, it would be inappropriate to characterize these data as "subjective." The term "subjective" implies that the estimates are modified by individual bias, when, in fact, the estimates used are based on direct observations from sea sampling and landings. These data are the best scientific information available to NMFS. The estimation methodology has been reviewed and accepted by the NMFS Stock Assessment Workshop process, which is a peer-reviewed process involving participants from academia, Federal and state agencies, and industry.

With this regulatory amendment, the discard estimates attributable to a period are to be subtracted from that period's TAC. The first step in estimating a TAC (used to determine the quota) is estimating current stock size. That stock size estimate is based on an analysis of the effects of both discards and landings. The target exploitation rate, including the effects of both discards and landings, is then "plugged into" the current stock size to determine the TAC. It is assumed that the observed discard pattern (including the ratio of discards to landings of fish at each age) in a given year will persist in the year for which the TAC is allocated. Thus, the TAC equals landings plus discards. If discards are not subtracted from the TAC, and the entire TAC is allowed as landings, then the target exploitation rate will be substantially exceeded.

Comment: Three industry associations, two individuals, and the MA-DMF questioned the adequacy of discard data used in calculating the commercial quota. Concern was expressed about inadequate sea sampling of offshore freezer trawler vessels and the lack of specific action to reduce discards. The MA-DMF

contends that the treatment of the discard data is inequitable to the Massachusetts fishery.

Response: The amount of discard data that may be collected is dependent on the amount of funding available for sea sampling in a given year. NMFS notes that sea sampling is especially difficult for the scup fishery, as the fishery is pursued over a wide geographic range as well as a wide range of seasons and gear types. However, this regulatory amendment and the existing FMP rely on data that are the best available scientific information.

Comment: Three industry associations and one U.S. Congressman felt the regulations gave no consideration to past conservation actions taken by the Commonwealth of Massachusetts and that Massachusetts lacks effective participation in fishery management plans administered jointly by the Council and Commission. Some of these commenters felt that this apparent lack of participation by Massachusetts was in violation of national standard 4.

Response: The allocation of commercial quota is based on data for a state's historical fishery from the base years of 1983 through 1992 and includes all data supplied by NMFS and the states for those years. Measures adopted by Massachusetts in 1992 and subsequent years, including a ban on night dragging and minimum fish size, are commendable and excellent conservation measures for the scup stock. However, those measures do not impact the landings during the base years that define the historical fishery in this regulatory amendment.

This regulatory amendment, as well as the FMP, was prepared jointly by the Council and the Commission, with assistance provided by the New England Fishery Management Council. Massachusetts effectively participated in the development of this regulatory amendment through two of those bodies: The New England Fishery Management Council, on which Massachusetts holds a voting seat, and the Commission, which votes on actions independent of the Council by way of the Summer Flounder, Scup, and Black Sea Bass Board (Board). A representative of Massachusetts chairs the Commission's Board. Massachusetts' participation, or any lack thereof, does not raise any issues with respect to national standard 4 that have not been addressed above.

Comment: One industry association made a specific request to eliminate wasteful, harmful fishing practices and encourage conservation by exempting handlines, scup pots, and weirs from the quota plan.

Response: The commercial quota is one of the major conservation measures to achieve the target exploitation rates of the FMP. The FMP specifically requires that all scup landed for sale in a state, regardless of where or how it is harvested, count against the quota. Therefore, there is no provision in the regulations to exempt the catch taken by any specific gear type from the quota. The commenter did not elaborate on how such an exemption from the quota by a user group would discourage wasteful and harmful fishing practices or encourage conservation. The commenter offered no alternative that would allow the inshore industry to assist in meeting the reductions in exploitation mandated by the FMP.

Comment: One industry association and one individual felt this regulatory amendment discriminated against specific gear types because the discard deduction does not distinguish between different fishing methods.

Response: The data presently available do not provide the basis to manage individual gear types differently. However, the regulatory amendment does provide a mechanism that will allow future consideration of gear differences, should such data become available.

Comment: Two individuals expressed concern that the quota would be caught early in the fishing year and that there would be no fishery for the summer inshore commercial fishery in Massachusetts.

Response: This regulatory amendment incorporates language to address specifically this concern. Any overages that occur in the 1997 Winter I allocation, and made prior to implementation of this regulatory amendment, will be taken off the 1997 Winter II and subsequent Winter periods. In 1998 and beyond, overages in a period's allocation will be deducted from that period the following year. In no scenario will an overage from a winter fishery impact a Summer period allocation.

Comment: One industry association and one member of the public commented that this regulatory amendment would financially devastate coastal communities. The association noted that almost all of its members derive greater than 50 percent of their income from the commercial harvest of scup. They feared that between May 1 and May 15 or 20, when trap fishermen and handliners normally start harvesting, the quota could be filled by dragners issued a Massachusetts Coastal Access vessel permit. As a result, Massachusetts' fishery would close before they could fish. This early

closure would result in financial devastation for the coastal communities in which they do business.

Response: Under this rule, the commercial quota for the Summer scup fishery (May through October) will be managed on a state-by-state basis. This regulatory amendment requires the full cooperation of the states in order for the entire FMP to be successful. The states may implement their Summer allocation in a manner that best suits their individual fisheries. Massachusetts may choose to implement its quota using trip limits or other measures to preserve quota for particular sectors of its industry. Such measures, implemented by the State, would serve to mitigate the financial impacts of the Summer quota. The Assistant General Council for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration, when this rule was proposed, that this rule is not expected to have a significant economic impact on a substantial number of small entities. That certification, including the reasons for it, was published in the preamble to the proposed rule (62 FR 5375, February 5, 1997). This regulatory amendment is intended to preserve the historical pattern of commercial harvest of scup by seasons, thus reducing the impact on small entities that may otherwise be felt under a coastwide quota with no method of controlling the rate of harvest.

Comment: One industry group and one member of the public expressed concern for participants in the recreational fishery because of the belief that the group, although large in number, receives very little quota and will be negatively impacted by this regulatory amendment.

Response: This regulatory amendment has no impact on the recreational fishery. The recreational sector of the fishery is currently operating under a target harvest limit that is not revised by this action. Final specifications for the commercial and recreational scup fisheries were published on March 14, 1997 (62 FR 12105). Those specifications allocate 6.0 million lb (2.7 million kg) to the commercial sector and 1.947 million lb (0.88 million kg) to the recreational sector. Neither allocation is changed by this regulatory amendment.

Comment: The MA-CZM commented that the Council should consider measures other than quota to control fishing (e.g., ban night trawling, etc.), as Massachusetts did several years ago.

Response: The commercial quota revised by this action is but one of several measures implemented under

Amendment 8 to control fishing mortality in the scup fishery. Other measures include a moratorium on new entrants into the fishery, gear restrictions, minimum fish size, pot/trap requirements, and a target harvest level for the recreational fishery. Generally, controls on fishing gear, such as mesh and escape vent sizes, control the rate of mortality on sublegal fish, i.e., fish that are not yet vulnerable to the gear. The quota measures constrain the number of legal sized fish that may be removed from a stock. These two measures combined are intended to achieve the goals of the FMP to reduce overfishing on the scup stock.

Comment: The MA-DMF commented that the mixed species/discard problem is not resolved with minimum fish and mesh size requirements. The MA-DMF strongly advocates large season/area closures in offshore waters, particularly during the fall through spring seasons to reduce the discard of small scup.

Response: NMFS agrees that such measures may be prudent for this fishery, and deserve to be seriously considered for implementation in 1998.

Changes From the Proposed Rule

This final rule implements the provisions of the regulatory amendment by amending 50 CFR part 648, Fisheries of the Northeastern United States. As a result of the President's Regulatory Reinvention Initiative, regulatory language for all of the fishery management plans within the purview of the Council and the New England Fishery Management Council were consolidated into part 648. In some cases, this final rule mentions fisheries other than scup in the regulatory language. The regulations governing these other fisheries have not been amended here and their mention in the regulatory language is merely to reduce confusion for the reader.

In § 648.14, paragraph (a)(89), the phrase "fish for, catch or retain" is revised to read "fish for, catch and retain, or land" to clarify the prohibition on landing more than the limit.

Since the measure to grant *de minimus* status to a state was disapproved by NMFS, in § 648.120, paragraphs (b)(2) through (b)(8) are redesignated as (b)(4) through (b)(10) and proposed paragraphs (b)(4) and (e) are removed from the regulations.

The paragraph specifying states' shares in proposed § 648.120(d)(7) is corrected to read "(d)(3)," and the requirement that the Council and Commission recommend to the Regional Administrator that the seasonal allocations in paragraph (d)(1) be revised as a result of changes in

landings data available from the states for the base years 1983-92, is added.

Proposed § 648.120(f) is redesignated as § 648.120(e).

Classification

This rule will enhance the efficiency of the Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries, and offer benefits in implementing the commercial quota provisions of this joint plan by redistributing the quota in the manner already approved by the Commission. In order to realize these benefits, this rule must be effective as close as possible to May 1, the start of the 1997 Summer period. Therefore, there is good cause under 5 U.S.C. 553(d)(3) not to delay for 30 days the effective date of these regulations but to make them effective upon the date of filing for public inspection at the Office of the Federal Register.

The Regional Administrator determined that this regulatory amendment is necessary for the conservation and management of the scup fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

Notwithstanding any other provision of the law, no person is required to respond to nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB control number.

This rule contains a collection-of-information requirement subject to the PRA. The state request to transfer quota has been approved by OMB under control number 0648-0202 and is estimated to average 1 hour per response. The estimated response time includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of the collection of information, including suggestions for reducing the burden, to NMFS and OMB (see ADDRESSES).

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration, when this rule was proposed, that the management measures contained in this regulatory amendment will not have a significant economic impact on a

substantial number of small entities. The reasons for this certification are contained in the certification, which was published as part of the preamble to the proposed rule (62 FR 5375, February 5, 1997) and are not repeated here.

NMFS received several comments from representatives of the Massachusetts inshore fishery regarding the economic impacts of this rulemaking, but none specifically addressing this certification. These comments were addressed in the Comments/Response section of this final rule. The commenters noted primarily that many participants in the inshore segment of the Massachusetts fishery derive a significant portion of their income from the harvest of scup during the Summer period. Other comments stressed that many of the landings from this segment of the fishery are not represented in the scup landings database. The commenters have come forward with concerns that can not be confirmed by the scup landings database. Without specific data on the level of fishing historically undertaken by the inshore segment of the commercial scup fishery, it is impossible to analyze the economic impacts on the inshore Massachusetts fishery versus the fishery as a whole. If the inshore fishery is taken as a distinct universe of participants for the purpose of determining impacts under RFA, it is conceivable that this action may meet the criteria for significant impact, as the commenters claim. However, NMFS cannot confirm that claim because data are lacking for that segment of the fishery. The comments did not provide any information changing the basis for the certification. As a result, no regulatory flexibility analysis was prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 16, 1997.

Gary Matlock,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.4, paragraph (b) is revised to read as follows:

§ 648.4 Vessel and individual commercial permits.

* * * * *

(b) *Permit conditions.* Any person who applies for a fishing permit under this section must agree as a condition of the permit that the vessel and the vessel's fishing activity, catch, and pertinent gear (without regard to whether such fishing occurs in the EEZ or landward of the EEZ, and without regard to where such fish or gear are possessed, taken or landed), are subject to all requirements of this part, unless exempted from such requirements under this part. All such fishing activities, catch, and gear will remain subject to all applicable state requirements. Except as otherwise provided in this part, if a requirement of this part and a management measure required by a state or local law differ, any vessel owner permitted to fish in the EEZ for any species managed under this part must comply with the more restrictive requirement. Owners and operators of vessels fishing under the terms of a summer flounder moratorium, scup moratorium, or black sea bass moratorium permit must also agree not to land summer flounder, scup, or black sea bass, respectively, in any state after NMFS has published a notification in the **Federal Register** stating that the commercial quota for that state or period has been harvested and that no commercial quota is available for the respective species. A state not receiving an allocation of summer flounder, scup, or black sea bass, either directly or through a coastwide allocation, is deemed to have no commercial quota available. Owners or operators fishing for surf clams and ocean quahogs within waters under the jurisdiction of any state that requires cage tags are not subject to any conflicting Federal minimum size or tagging requirements. If a surf clam and ocean quahog requirement of this part differs from a surf clam and ocean quahog management measure required by a state that does not require cage tagging, any vessel owners or operators permitted to fish in the EEZ for surf clams and ocean quahogs must comply with the more restrictive requirement while fishing in state waters. However, surrender of a surf clam and ocean quahog vessel permit by the owner by certified mail addressed to the Regional Administrator allows an individual to comply with the less restrictive state minimum size requirement, as long as fishing is conducted exclusively within state waters. If the commercial black sea bass quota for a period is harvested and the coast is closed to the possession of

black sea bass north of 35°15.3' N. lat., any vessel owners that hold valid commercial permits for both the black sea bass and the NMFS Southeast Region Snapper-Grouper fisheries may surrender their moratorium Black Sea Bass permit by certified mail addressed to the Regional Administrator and fish pursuant to their Snapper-Grouper permit, as long as fishing is conducted exclusively in waters, and landings are made, south of 35°15.3' N. lat. A moratorium permit for the black sea bass fishery that is voluntarily relinquished or surrendered will be reissued upon the receipt of the vessel owner's written request after a minimum period of 6 months from the date of cancellation.

* * * * *

3. In § 648.14, paragraphs (a)(89) through (a)(101) are redesignated as (a)(90) through (a)(102), respectively, and a new paragraph (a)(89) is added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(89) Fish for, catch and retain, or land scup in or from the EEZ north of 35°15.3' N. lat. in excess of the landing limit established pursuant to § 648.120 (b)(2) and (b)(3).

* * * * *

4. In § 648.120, paragraph (b)(1) is revised, paragraphs (b)(2) through (b)(8) are redesignated as paragraphs (b)(4) through (b)(10), respectively, new paragraphs (b)(2) and (b)(3) are added, paragraphs (c) and (d) are revised, and paragraph (e) is added to read as follows:

§ 648.120 Catch quotas and other restrictions.

* * * * *

(b) * * *

(1) The commercial quota for each of the three periods specified in paragraph (d)(1) of this section, to be set from a range of 0 to the maximum allowed to achieve the specified exploitation rate.

The commercial quota will be established by estimating the annual total allowable catch (TAC), allocating it into the three periods, and deducting the discard estimates for each period.

(2) Landing limits for the Winter I and Winter II periods.

(3) Percent of landings attained at which the landing limit for the Winter I period will be reduced.

* * * * *

(c) *Annual fishing measures.* The Demersal Species Committee shall review the recommendations of the Scup Monitoring Committee. Based on these recommendations and any public comment, the Demersal Species

Committee shall recommend to the MAFMC measures necessary to assure that the specified exploitation rate will not be exceeded. The MAFMC shall review these recommendations and, based on these recommendations and any public comment, recommend to the Regional Administrator measures necessary to assure that the specified exploitation rate will not be exceeded. The MAFMC's recommendation must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the recommendations. The Regional Administrator shall review these recommendations and any recommendations of the Commission. After such review, NMFS will publish a proposed rule in the **Federal Register** by October 15 to implement a commercial quota, specifying the amount of quota allocated to each of the three periods, landing limits for the Winter I and Winter II periods, the percentage of landings attained during the Winter I fishery at which the landing limits will be reduced, a recreational harvest limit and additional management measures for the commercial fishery. NMFS will publish a proposed rule in the **Federal Register** by February 15 to implement additional management measures for the recreational fishery, if the Regional Administrator determines that such measures are necessary to assure that the specified exploitation rate will not be exceeded. After considering public comment, NMFS will publish a final rule in the **Federal Register** to implement the annual measures.

(d) *Distribution of Commercial Quota.* (1) The annual commercial quota will be allocated into three periods, based on the following percentages:

Period	Percent
Winter I—January—April	45.11
Summer—May—October	38.95
Winter II—November—December ..	15.94

(2) The Winter I and Winter II commercial quotas will each be distributed to the coastal states from Maine through North Carolina on a coastwide basis.

(3) The Summer commercial quota will be allocated to the coastal states from Maine through North Carolina, based upon the following percentages:

**SUMMER PERIOD (MAY—OCTOBER)
COMMERCIAL QUOTA SHARES**

State	Share (percent)
Maine	0.13042
New Hampshire	0.00004

SUMMER PERIOD (MAY–OCTOBER)
COMMERCIAL QUOTA SHARES—
Continued

State	Share (percent)
Massachusetts	15.49120
Rhode Island	60.56589
Connecticut	3.39884
New York	17.05295
New Jersey	3.14307
Delaware	0.00000
Maryland	0.01286
Virginia	0.17789
North Carolina	0.02690
Total	100.00000

(4) All scup landed for sale in any state during either Winter I or Winter II shall be applied against the coastwide commercial quota for that period, regardless of where the scup were harvested. All scup landed for sale in a state during the Summer period shall be applied against that state's summer commercial quota, regardless of where the scup were harvested.

(5) All scup landed for sale in any state during the period January 1, 1997, through April 30, 1997, shall be applied against the coastwide commercial quota for the 1997 Winter I period, regardless of where the scup were harvested. Any landings during that time in excess of the 1997 Winter I commercial quota will be subtracted from the 1997 Winter II period's allocation. Any overage beyond the 1997 Winter II allocation will be deducted from subsequent winter periods.

(6) Beginning in 1997, any overages of the commercial quota landed in any state during the Summer period will be deducted from that state's Summer period quota for the following year. Beginning in 1998, any overages of the commercial quota landed in any Winter period will be subtracted from the period's allocation for the following year.

(7) Based upon any changes in the landings data available from the states for the base years 1983–92, the Commission and the Council may recommend to the Regional Administrator that the states' shares specified in paragraph (d)(3) of this section and the period allocations specified in paragraph (d)(1) of this section be revised. The Council's and the Commission's recommendation must include supporting documentation, as appropriate, concerning the environmental and economic impacts of the

recommendation. The Regional Administrator shall review the recommendation of the Commission and the Council. After such review, NMFS will publish a proposed rule in the **Federal Register** to implement a revision in the state shares. After considering public comment, NMFS will publish a final rule in the **Federal Register** to implement the changes in allocation.

(e) *Quota transfers and combinations.* Any state implementing a state commercial quota for scup may request approval from the Regional Administrator to transfer part or all of its Summer period quota to one or more states. Two or more states implementing a state commercial quota for scup may request approval from the Regional Administrator to combine their quotas, or part of their quotas, into an overall regional quota. Requests for transfer or combination of commercial quotas for scup must be made by individual or joint letter(s) signed by the principal state official with marine fishery management responsibility and expertise, or his or her previously named designee, for each state involved. The letter(s) must certify that all pertinent state requirements have been met and identify the states involved and the amount of quota to be transferred or combined.

(1) Within 10 working days following the receipt of the letter(s) from the states involved, the Regional Administrator shall notify the appropriate state officials of the disposition of the request. In evaluating requests to transfer a quota or combine quotas, the Regional Administrator shall consider whether:

(i) The transfer or combination would preclude the overall Summer period quota from being fully harvested.

(ii) The transfer addresses an unforeseen variation or contingency in the fishery.

(iii) The transfer is consistent with the objectives of the Summer Flounder, Scup, and Black Sea Bass FMP and the Magnuson-Stevens Act.

(2) The transfer of quota or the combination of quotas will be valid only for the Summer period for which the request was made and will be effective upon the filing by NMFS of a notification of approval of the quota transfer or combination with the Office of the Federal Register.

(3) A state may not submit a request to transfer quota or combine quotas if a request to which it is party is pending

before the Regional Administrator. A state may submit a new request when it receives notice that the Regional Administrator has disapproved the previous request or when notification of approval of the quota transfer or combination has been filed at the Office of the Federal Register.

(4) If there is a quota overage among states involved in the combination of quotas at the end of the Summer period, the overage will be deducted from the following Summer period's quota for each of the states involved in the combined quota. The deduction will be proportional, based on each state's relative share of the combined quota for the previous Summer period. A transfer of quota or combination of quotas does not alter any state's percentage share of the overall Summer period quota specified in paragraph (d) of this section.

5. Section 648.121 is revised to read as follows:

§ 648.121 Closures.

(a) *Winter closures.* The Regional Administrator will monitor the harvest of commercial quota for each Winter period based on dealer reports, state data, and other available information and shall determine the date when the commercial quota for a Winter period will be harvested. NMFS shall close the EEZ to fishing for scup by commercial vessels for the remainder of the indicated period by publishing notification in the **Federal Register** advising that, effective upon a specific date, the commercial quota for that period has been harvested, and notifying vessel and dealer permit holders that no commercial quota is available for landing scup for the remainder of the period.

(b) *Summer closure.* The Regional Administrator will monitor the Summer period state commercial quota based on dealer reports, state data, and other available information, and shall determine the date when a state's commercial quota will be harvested. NMFS shall publish notification in the **Federal Register** advising a state that, effective upon a specific date, its Summer period commercial quota has been harvested and notifying vessel and dealer permit holders that no Summer period commercial quota is available for landing scup in that state for the remainder of the period.

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