

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 648**

[I.D. 101603C]

**Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery; Suspension of Minimum Surfclam Size for 2004**

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

**ACTION:** Notice of suspension of surfclam minimum size limit.

**SUMMARY:** NMFS suspends the minimum size limit of 4.75 inches (12.07 cm) for Atlantic surfclams for the 2004 fishing year. This action is taken under the authority of the implementing regulations for this fishery, which allow for the annual suspension of the minimum size limit based upon set criteria. The intended effect is to relieve the industry from a regulatory burden that is not necessary, as the majority of surfclams harvested are larger than the minimum size limit.

**DATES:** Effective January 1, 2004, through December 31, 2004.

**FOR FURTHER INFORMATION CONTACT:** Heather L. Sagar, Fishery Management Specialist, 978-281-9341.

**SUPPLEMENTARY INFORMATION:** Section 648.72(c) of the regulations implementing the Fishery Management Plan (FMP) for the Atlantic Surfclam and Ocean Quahog Fisheries allows the Administrator, Northeast Region, NMFS (Regional Administrator) to suspend annually, by publication of a notification in the **Federal Register**, the minimum size limit for Atlantic surfclams. This action may be taken unless discard, catch, and survey data indicate that 30 percent of the Atlantic surfclam resource is smaller than 4.75 inches (12.07 cm) and the overall reduced size is not attributable to harvest from beds where growth of the individual clams has been reduced because of density-dependent factors.

At its June 2003, meeting, the Mid-Atlantic Fishery Management Council (Council) voted to recommend that the Regional Administrator suspend the minimum size limit. Commercial surfclam shell length data for 2003 were analyzed to determine the percentage of surfclams landed that were smaller than the minimum size requirement. The analysis indicated that 1.2 percent of the samples taken overall were composed of

surfclams that were less than 4.75 inches (12.07 cm). Based on these data, the Regional Administrator adopts the Council's recommendation and suspends the minimum size limit for Atlantic surfclams from January 1, 2004, through December 31, 2004.

**Classification**

This action is authorized by 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: October 27, 2003.

**Bruce C. Morehead,**

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

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 648**

[Docket No. 030912231-3266-02; I.D. 090403A]

**RIN 0648-AR43**

**Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; Framework Adjustment 3**

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

**ACTION:** Final rule; notification of scup Winter II quota adjustment and possession limit adjustment for 2003.

**SUMMARY:** NMFS issues this final rule to implement measures contained in Framework Adjustment 3 (Framework 3) to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) to allow the rollover of unused commercial scup quota from the Winter I period to the Winter II period, and to change the regulations regarding the scup commercial quota counting procedures. NMFS also adjusts the 2003 Winter II commercial scup quota and possession limit.

**DATES:** This rule is effective November 1, 2003, except for § 648.120(b)(4) and § 648.120(d)(5) which are effective April 1, 2004.

**ADDRESSES:** Copies of the Framework 3 document, including the Regulatory Impact Review (RIR), the Initial Regulatory Flexibility Analysis (IRFA), and the Environmental Assessment, and other supporting documents for the

framework adjustment are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901-6790. The Framework 3 document is also accessible via the Internet at <http://www.mafmc.org>. The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses contained in this final rule, and the summary of impacts and alternatives contained in this final rule. Copies of the small entity compliance guide are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930-2298.

**FOR FURTHER INFORMATION CONTACT:**

Sarah McLaughlin, Fishery Policy Analyst, (978) 281-9279, fax (978) 281-9135, e-mail [sarah.mclaughlin@noaa.gov](mailto:sarah.mclaughlin@noaa.gov).

**SUPPLEMENTARY INFORMATION:** This final rule implements measures contained in Framework 3 to the FMP. Details concerning the justification for and development of Framework 3 and the implementing regulations were provided in the preamble to the proposed rule (68 FR 55283, September 24, 2003) and are not repeated here.

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Atlantic States Marine Fisheries Commission (Commission) and the Mid-Atlantic Fishery Management Council (Council), in consultation with the New England and South Atlantic Fishery Management Councils. The management unit for scup (*Stenotomus chrysops*), specified in the FMP, is defined as 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 FMP and its implementing regulations found at 50 CFR part 648, subparts A, G (summer flounder), H (scup), and I (black sea bass), describe the process for specifying annual commercial scup measures that apply in the Exclusive Economic Zone (EEZ). The states manage these fisheries within 3 miles of their coast, under the Commission's Interstate Summer Flounder, Scup, and Black Sea Bass FMP. The Federal regulations govern vessels fishing in the EEZ, as well as vessels possessing a Federal fisheries permit, regardless of where they fish.

The commercial scup fishery is managed under a system that allocates the annual quota to three periods: Winter I, January-April (45.11 percent); Summer, May-October (38.95 percent); and Winter II, November-December

(15.94 percent). During the Winter periods, the quota is monitored on a coastwide basis. During the Summer period, the quota is also monitored on a coastwide basis, but the Commission uses a state-by-state allocation system to help manage the Federal quota. The Federal commercial scup fishery is closed coastwide when the allocation for a period is reached. In addition, any overages during a quota period are subtracted from that period's allocation for the following year. Any quota overages by a state during the Summer period (whether or not the total Summer period quota is exceeded) are subtracted by the Commission from the state's Summer period share the following year. The current regulations do not allow for the transfer of quota between periods within a fishing year. The final rule to implement the 2003 annual quota specifications (68 FR 60, January 2, 2003) established possession limits of 15,000 lb (6,804 kg) per trip during Winter I and 1,500 lb (680 kg) during Winter II, and specified that the Winter I possession limit be reduced to 1,000 lb (454 kg) per trip when 80 percent of the commercial quota allocated to that period is projected to be harvested.

#### **Quota Rollover From Winter I to Winter II**

This final rule implements a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be added to the quota for the Winter II period. During the development of this framework adjustment, the Council considered and analyzed three alternatives for unused Winter I quota: Taking no action, which would continue the current regulations without the ability to transfer unused quota between periods (Alternative 1); the proposed option (Alternative 2); and combining the Winter I and Winter II quotas into a single quota spanning the two periods (Alternative 3). A fourth option, to roll over unused quota from both the Winter I and Summer periods into Winter II, was considered but rejected for further analysis due to the impracticability of monitoring the Summer period quota through the end of the Summer period, calculating the amount of unused combined Winter I and Summer period quota, if any, and effecting the quota rollover prior to the beginning of the Winter II period. The proposed option was selected by the Council because, under Alternative 1, regulatory discarding in Winter II would continue to occur, and Alternative 3 would introduce the risk that the entire combined winter quota could be taken during Winter I, resulting in no fishery

during Winter II. Additionally, it would be difficult to develop possession limits that would accommodate the merged periods under Alternative 3. Alternative 2 is not associated with any risk to the scup stock or stocks of other species, and should provide economic and social benefits while meeting the objectives of National Standard 1.

In addition, commercial possession limits for the Winter II period will be adjusted, based on the amount of quota rolled over from the Winter I period. It is the Council's intention that the quota rollover and any necessary possession limit adjustments will be accomplished via a notification of changes prior to the beginning of the Winter II fishery.

For 2003, the Winter II quota is 1,979,689 lb (897,981 kg), and the best available landings information indicates that 1,873,050 lb (849,601 kg) remain of the Winter I quota. Consistent with the intent of Framework 3, the full amount of unused 2003 Winter I quota is transferred to Winter II, resulting in a revised 2003 Winter II quota of 3,852,739 lb (1,747,573 kg). In addition to the quota transfer, the 2003 Winter II possession limit is increased to 4,000 lb (1,814 kg) per trip to provide an appropriate opportunity for fishing vessels to obtain the increased Winter II quota. For 2004 and future years, the Council will recommend Winter II possession limits, adjusted as appropriate based on the amount rolled over from Winter I to Winter II, as part of the annual commercial quota specification process.

#### **Quota Counting Procedures**

The distribution of scup is such that they are occasionally available in nearshore (state) waters prior to the beginning of the states' Summer period (May 1). This final rule implements a mechanism, for years when the Winter I commercial scup quota is completely harvested and the Winter I fishery is closed prior to April 15, and upon a state's written request, to allow for commercial landings of scup by state-only permitted vessels in said state that occur from April 15 through April 30 to be counted against that state's Summer quota allocation. Because harvest in state waters during the Summer period is under the jurisdiction of the Commission, this is primarily a Commission issue, but this final rule implements a change to the Federal regulations regarding the quota counting procedures to effect the change to the Commission allocation system.

During the development of this framework adjustment, the Council considered and analyzed two options for the quota counting procedures: A no-

action alternative, which would not allow these landings to be counted against the Summer period quota, but would continue to require that they be recorded as an overage to the Winter I period quota; and the proposed option. The action implemented was selected by the Council because it would not alter the current quota period or allocations, would require only a minimal change to current Federal regulations, would reduce the negative effects associated with harvest demand when scup availability is high but landings are not allowed, and would not place the scup stock or stocks of other species at risk.

#### **Changes from the Proposed Rule**

As indicated in the proposed rule, the amount of unused Winter I quota to be transferred to Winter II has been updated based on the latest (and best available) landings information for the 2003 Winter I period. The resulting 2003 Winter II quota is 3,852,739 lb (1,747,573 kg) rather than 4,183,440 lb (1,897,576 kg) as originally proposed. The reason for the decrease is that, in preparation of the final rule, Winter I landings information from dealer weighout reports became available and were used, in combination with the Winter I interactive voice response data (used in preparation of the proposed rule), to best estimate total landings for the Winter I period.

For clarification purposes, in § 648.120(b)(2) and § 648.120(c), the terms "landing limits" and "landings limits" are changed to "possession limits," and in the first sentence of § 648.120(d)(3), the phrase "for each quota period" is changed to "for the Winter I period." The second sentence of § 648.120(d)(3) is corrected to clarify that if, in any year that the Regional Administrator determines that the landings of scup during Winter I are less than the Winter I quota for that year, he/she shall increase the Winter II quota for that year by the amount of the Winter I underharvest. The first sentence of § 648.120(d)(5) is corrected to clarify the process by which a state may apply to the Regional Administrator for authorization to count scup landings in state waters against the Summer period quota.

#### **Comments and Responses**

One comment was received on the proposed rule, although the comment did not specifically address the proposed scup action.

*Comment:* The commenter expressed general support for marine protected areas, reduction of commercial quotas in general, elimination of bottom trawling

and longlining, and better enforcement of fisheries regulations. The commenter also objected to NOAA Fisheries not accepting comments via e-mail on this action.

*Response:* This rule implements measures designed to provide for improved utilization of the Federal commercial scup quota, and to improve efficiency of this fishery. While NMFS acknowledges the importance of the issues raised by the commenter, this rule is not the proper mechanism to address these general issues.

#### Classification

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

During the Winter scup quota periods, the quota is monitored on a coastwide basis, and the commercial scup fishery is closed coastwide when the allocation for a period is reached. The current regulations do not allow for the transfer of quota between periods within the year. Underharvest of the Winter I quota occurred in 2002 and 2003, leaving available quota unused, whereas quota for the Winter II period has been harvested early each year since 1999. Under the current management system, negative economic impacts may result from early closure of the Winter II fishery. In an effort to lengthen the fishing season under a relatively small quota, a possession limit is implemented, but this can result in regulatory discards of fish caught in excess of the possession limit. Any overages during a Winter quota period are subtracted from the period's allocation for the following year.

This action relieves a restriction by implementing a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be rolled over to the quota for the Winter II period. Without this action, the Winter II fishery must close when the initial Winter II quota is reached, even if substantial quota remains from the Winter I period. This action allows the Winter II fishery to remain open longer, by allowing vessels to take advantage of remaining Winter I quota. Commercial possession limits for the Winter II period also are adjusted upward, based on the amount of quota rolled over from the Winter I period, to allow for the landing of scup that were available during the 2003 Winter I period, but were not harvested. This action allows for improved coordination of timing of the fishery's harvest potential with the availability of the resource. Additionally, because the Winter II quota typically has been harvested

before the end of the quota period, the rollover of quota from the Winter I period is expected to extend the Winter II season and have a positive economic impact on the ports and communities associated with the vessels participating in this fishery. Therefore, the 30-day delayed effectiveness period for the management measures regarding the quota rollover from Winter I to Winter II is not applicable, as this rule relieves restrictions pursuant to 5 U.S.C. 553(d)(1).

Included in this final rule is the Final Regulatory Flexibility Analysis (FRFA) prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the IRFA, the comments and responses to the proposed rule, and the analyses completed in support of this action. A copy of the 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 explained in the preambles to the proposed rule and this final rule and are not repeated here.

##### *Summary of Significant Issues Raised in Public Comments*

One comment was received during the comment period on the proposed rule, although it did not pertain to the economic impacts of this rule. No significant issues were raised and, therefore, no changes to the proposed rule were required to be made as a result of public comments. For a summary of the comment received, refer to the section above titled "Comments and Responses."

##### *Description and Estimate of Number of Small Entities to which Rule Will Apply*

Federal Northeast permit data indicate that there were 878 vessels with scup commercial permits in 2001. This action could affect any commercial vessel holding an active Federal Northeast scup permit by providing permit holders with an increased opportunity to harvest scup during the Winter II period, if some portion of the Winter I quota for that year is unused. The Summer period allocation element of this action would affect only how certain landings are attributed, and would not affect the ability of vessels holding only a state permit to land and sell scup during a Federal closure.

##### *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**

It is not possible to further mitigate economic impacts on small entities because the Council selected the alternative with most positive economic impacts relative to the other alternatives determined to achieve the biological objectives. Specification of commercial quotas and possession limits is constrained by the conservation objectives of the FMP, and implemented at 50 CFR part 648 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Under the no-action quota rollover alternative, the current allocation system as specified in the FMP would remain unchanged, and any negative economic impacts associated with it could persist. More specifically, a portion of the annual quota allocated to Winter I may be left unharvested, which would result in foregone economic opportunities to the fishing industry. Additionally, the existing regulations require that once the Winter II quota has been achieved, additional scup captured by the fishery operating during that time of year be discarded.

Allowing the transfer of unused scup quota from the Winter I period to the Winter II period could potentially increase landings of scup during the Winter II period. Applying the nominal average ex-vessel price of scup for the 1998–2002 Winter II period of \$0.80/lb (\$1.76/kg), and assuming the transfer of 1,873,050 lb (849,601 kg), the additional amount of scup available for harvest during the 2003 Winter II period would be valued at approximately \$1.5 million. If this increase in revenue is equally distributed among the 213 vessels that landed scup during the 2002 Winter II period, then overall ex-vessel gross revenues could increase by \$7,034 per vessel. However, as it is possible that the average price for scup during Winter II may decrease, given the potential increase in scup landings, the estimate of the increase to ex-vessel gross revenues most likely represents an upper limit.

The proposed Winter II possession limit for 2003 of 4,000 lb (1,814 kg) per trip is not expected to impact the scup fishery negatively. In fact, the increased

possession limit may have positive impacts by providing the market a regular product supply, and avoiding market gluts and price fluctuations.

It is expected that the rollover of unused quota from Winter I to Winter II would reduce social burdens associated with early closures that may occur under the current system for managing scup, as it would preserve fishing opportunities that would not be available if the scup fishery was closed. By extension, it is expected that maintaining fishing opportunities would have a positive impact on the ports and communities associated with the vessels participating in this fishery.

The Council determined that the impacts of the combination of Winter I and Winter II into one period would be similar to those for the action implemented. However, under this alternative, it is possible that the entire quota could be harvested during Winter I. If this were to occur, fishermen would not be able to fish for scup during the Winter II period, potentially disrupting product supply, increasing discards, and contributing to price fluctuations, as well as severely constraining fishing opportunities for those fishermen that depend upon access to the Winter II quota period fishery. The Council selected the action being implemented under this final rule because it would provide the maximum economic benefit to the fishing industry by ensuring that any unused Winter I period scup quota would be made available in the Winter II period.

The change to the quota counting procedures is not expected to affect overall scup landings, as total landings would continue to be restricted to the annual commercial quota. It is possible that, if the Winter I fishery were closed and inshore fishermen were allowed to land and sell scup, scup prices could increase. However, given the short length of time that inshore fishermen would have to land any scup harvested during a Winter I closure, i.e., April 15 through April 30, it is not expected that the scup price would be significantly affected. Nevertheless, selling scup harvested by inshore fisheries prior to May 1 during a Winter I closure would likely provide economic and social benefits to inshore fisheries. It is possible that the preferred alternative could result in the Summer period quota being harvested earlier. This would depend on the amount of the Summer quota, numbers of fishermen that may participate in an early summer fishery, and/or the amount of scup that could potentially be landed after April 15 and prior to May 1 in the event of a Winter I closure. However, due to lack

of information on these factors, this was not analyzed in detail.

#### *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 (the guide) was prepared. Copies of the guide will be sent to all holders of commercial Federal scup fishery permits. The guide will be available on the Internet at <http://www.nero.noaa.gov>. Copies of the guide can also be obtained from the Regional Administrator (see ADDRESSES).

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

Fishing, Fisheries, Reporting and recordkeeping requirements.

Dated: October 29, 2003.

**Rebecca Lent,**

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

■ For the reasons stated 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 § 648.120, paragraphs (b)(2), (b)(4), and (c) are revised; paragraph (d)(3) is redesignated as paragraph (d)(4) and the introductory text is revised; and new paragraphs (d)(3) and (d)(5) are added to read as follows:

#### **§ 648.120 Catch quotas and other restrictions.**

\* \* \* \* \*

(b) \* \* \*

(2) Possession limits for the Winter I and Winter II periods, including possession limits that result from potential rollover of quota from Winter I to Winter II. The possession limit is the maximum quantity of scup that is allowed to be landed within a 24-hour period (calendar day).

\* \* \* \* \*

(4) All scup landed for sale in any state during a quota period shall be applied against the coastwide

commercial quota for that period, regardless of where the scup were harvested, except as provided in paragraph (d)(5) of this section.

\* \* \* \* \*

(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'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 to implement a commercial quota in the **Federal Register**, specifying the amount of quota allocated to each of the three periods, possession limits for the Winter I and Winter II periods, including possession limits that result from potential rollover of quota from Winter I to Winter II, the percentage of landings attained during the Winter I fishery at which the possession limits will be reduced, a recreational harvest limit, and additional management measures for the commercial fishery. If the Regional Administrator determines that additional recreational measures are necessary to assure that the specified exploitation rate will not be exceeded, he or she will publish a proposed rule in the **Federal Register** to implement additional management measures for the recreational fishery. After considering public comment, the Regional Administrator will publish a final rule in the **Federal Register** to implement annual measures.

(d) \* \* \*

(3) The Regional Administrator will monitor the harvest of commercial quota for the Winter I period based on dealer reports, state data, and other available information and shall determine the total amount of scup landed during the Winter I period. In any year that the Regional Administrator determines that the landings of scup during Winter I are less than the Winter I quota for that year, he/she shall increase, through publication of a notification in the **Federal Register**, provided such rule complies with the requirements of the Administrative Procedure Act, the Winter II quota for that year by the amount of the Winter I underharvest.

The Regional Administrator shall also adjust, through publication of a notification in the **Federal Register**, the Winter II possession limits consistent with the amount of the quota increase, based on the possession limits established through the annual specifications-setting process.

(4) All scup landed for sale in any state during a quota period shall be applied against the coastwide commercial quota for that period, regardless of where the scup were harvested, except as provided in paragraph (d)(5) of this section. Any current year landings in excess of the

commercial quota in any quota period will be deducted from that quota period's annual quota in the following year as prescribed below:

\* \* \* \* \*

(5) During a fishing year in which the Winter I quota period is closed prior to April 15, a state may apply to the Regional Administrator for authorization to count scup landed for sale in that state from April 15 through April 30 by state-only permitted vessels fishing exclusively in waters under the jurisdiction of that state against the Summer period quota. Requests to the Regional Administrator to count scup

landings in a state from April 15 through April 30 against the Summer period quota must be made by letter signed by the principal state official with marine fishery management responsibility and expertise, or his/her designee, and must be received by the Regional Administrator no later than April 15. Within 10 working days following receipt of the letter, the Regional Administrator shall notify the appropriate state official of the disposition of the request.

\* \* \* \* \*

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