

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

[Docket No. 040122024-4105-02; I.D. 010904A]

RIN 0648-AR75

**Fisheries of the Northeastern United States; Tilefish Fishery; Reinstatement of Permit Requirements for the Tilefish Fishery**

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

**ACTION:** Final rule; reinstatement of the permit requirements for the tilefish fishery.

**SUMMARY:** NMFS reinstates the permit requirements for commercial tilefish vessels. These permit requirements were set aside in a recent Federal Court Order (Court Order) on the grounds that the limited access program contained in the Tilefish Fishery Management Plan (FMP) violated National Standard 2 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Court found that there was insufficient support for the various limited access permit criteria in the administrative record for the FMP. NMFS is reinstating these permit requirements based on additional information in the form of a supplemental administrative record to the FMP (supplemental record) provided by the Mid-Atlantic Fishery Management Council (Council) that supports and explains the basis for the limited access permit criteria contained in the FMP. This action also allocates the remainder of the fishing year 2004 (November 1, 2003 - October 31, 2004) tilefish total allowable landings (TAL) to the various limited access permit categories according to the regulations, based upon a projection of tilefish landings through the effective date of this rule, and using dealer reports. This action will enable NMFS to manage the tilefish fishery in accordance with the provisions of the Magnuson-Stevens Act by preventing overfishing, and ensuring that the stock rebuilding objective of the FMP is achieved.

**DATES:** Effective May 31, 2004.

**ADDRESSES:** Copies of the Final Environmental Impact Statement (FEIS) prepared for the FMP may be obtained by contacting Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room

2115 Federal Building, 300 South New Street, Dover, DE 19904. The FEIS, which was completed in 2001, contained a complete analysis of the impacts of the permit requirements contained in the FMP. Because nothing has changed since the FEIS was completed that would affect that determination, further analysis under the National Environmental Policy Act (NEPA) is unnecessary. Copies of the final rule, including the Final Regulatory Flexibility Analysis (FRFA), the supplemental record, and the small entity compliance guide are available upon request from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930-2298. The final rule, including the FRFA, and the small entity compliance guide are also accessible via the Internet at <http://www.nero.nmfs.gov>.

**FOR FURTHER INFORMATION CONTACT:** Douglas W. Christel, Fishery Policy Analyst, (978) 281-9141, fax (978) 281-9135, e-mail [Douglas.Christel@noaa.gov](mailto:Douglas.Christel@noaa.gov).

**SUPPLEMENTARY INFORMATION:** This final rule reinstates measures contained in the FMP, which was approved by NMFS on behalf of the Secretary of Commerce (Secretary) on May 10, 2001. Details concerning the rationale behind the need for this rulemaking to reinstate the permit requirements of the tilefish fishery were provided in the preamble to the proposed rule (69 FR 6635, February 11, 2004) and are only summarized here.

**Background**

The tilefish fishery is managed by the Council under the FMP, which was implemented on November 1, 2001 (66 FR 49136; September 26, 2001). Measures in the FMP include a limited entry program; a tiered commercial quota based on the limited entry program; permit and reporting requirements for commercial vessels, operators, and dealers; a prohibition on the use of gear other than longline gear by limited access tilefish vessels; and an annual specification and framework adjustment process.

On May 15, 2003, the Court Order set aside the regulations pertaining to the permit requirements for commercial tilefish vessels specified under § 648.4(a)(12). In its order, the Court concluded that the tilefish limited access program violated National Standard 2 of the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) because it was not based on the best scientific information available. In doing so, the Court rendered inoperative the vessel

operator permit requirements under § 648.5(a), the vessel reporting requirements under § 648.7(b)(2)(ii), the observer coverage regulations under § 648.11(a), and the incidental catch limit under § 648.292. The Court held that the Secretary must adopt a plan that is based on the best scientific information available, which may be the existing plan, but only if the evidence in the administrative record (record) clearly supports it.

A supplemental record has been compiled that describes in detail the steps taken by the Council and the Tilefish Committee in developing the limited access program alternatives contained in the FMP, and the rationale behind their selection of a preferred limited access program. This supplemental record does not change any determinations made in the FEIS implementing the FMP. As a result, the qualification criteria used to qualify vessels for the three limited access permit categories is not changed by this rule. Therefore, vessels that held limited access tilefish permits prior to the Court's decision will remain in the permit category they initially qualified for. A summary of the supplemental record is contained in the preamble of the proposed rule and a copy of the full supplemental record is available from the Regional Administrator (see **ADDRESSES**).

Based upon the supplemental record, this action reinstates the vessel permitting requirements of the FMP, specified under § 648.4(a)(12). Since the yearly tilefish TAL is distributed among the limited access permit categories, this action also distributes the remaining tilefish TAL for the 2004 fishing year among the reestablished permit categories according to the regulations at § 648.290. The 2004 tilefish TAL for the entire fishing year was set at 1,995 million lb (904,932 kg). The TAL is first reduced by 5 percent to account for incidental catch of tilefish. The remaining 1,895,250 lb (861,477 kg) is then distributed among the limited access permit categories, with Full-time Tier 1 vessels allocated 66 percent, or 1,250,865 lb (567,392 kg); Full-time Tier 2 vessels allocated 15 percent, or 284,288 lb (128,953 kg); and Part-time vessels allocated 19 percent, or 360,098 lb (163,340 kg). Through this final rule, the allocations for each permit category are reduced by the amount of tilefish projected to have been landed between the start of the fishing year (November 1, 2003) through the effective date of the final rule, May 31, 2004, to determine the amount of tilefish TAL remaining for each permit category for the remainder of the 2004 fishing year.

Because the Court Order rendered inoperative the vessel reporting requirements specified under § 648.7(b)(2)(ii), vessels that held limited access permits under the FMP prior to the Court Order have not been required to report their landings within a 24-hour period through the interactive voice response (IVR) system. Although many of these vessels have continued to report their landings through the IVR system, the only required and, therefore, reliable means of monitoring the tilefish TAL has been through the dealer weighout (DWO) system. Because reliable real-time DWO data are currently only available through September 2003, DWO data reflecting the daily landings of limited access tilefish vessels from November 1, 2002, through May 31, 2003, were used to determine landings for the November 1, 2003, through May 31, 2004, period. This information represents the most accurate information available. As a result, dealer reports were used to project tilefish landings attributable to limited access tilefish vessels through the effective date of this final rule. A total of 998,582 lb (452,957 kg) of tilefish was projected to be harvested by limited access vessels between November 1, 2002, and May 31, 2003. Based on this projection, during this period, Full-time Tier 1 vessels landed 665,278 lb (301,770 kg) of tilefish, Full-time Tier 2 vessels landed 173,997 lb (78,925 kg) of tilefish, and Part-time vessels landed 159,307 lb (72,262 kg) of tilefish. As explained above, these amounts have been subtracted from the initial TAL allocated to each permit category. Accordingly, based upon the procedure specified above, the remaining tilefish TAL available for the remainder of the 2004 fishing year is as follows: Full-time Tier 1 vessels are allocated 585,587 lb (265,622 kg), Full-time Tier 2 vessels are allocated 110,291 lb (50,028 kg), and Part-time vessels are allocated 200,791 lb (91,079 kg).

This action also removes the prohibition of the use of all gear other than longline gear for limited access tilefish vessels, which was struck down by the Court. This prohibition is removed due to a lack of information to support reinstating the ban on the use of gear other than longline gear in the directed tilefish fishery.

The purpose of this action is to prevent overfishing and ensure that the stock rebuilding objective of the FMP is achieved. Although the regulatory text for the tilefish permitting requirements was set aside by the Court Order, NMFS never formally removed these regulations from 50 CFR part 648. Therefore, this final rule does not

contain any new regulatory language to reinstate the permit requirements.

### Comments and Responses

The comment period on the proposed rule ended March 12, 2004. Two comments were received.

*Comment 1:* The commenter suggested that the stock rebuilding schedule for the FMP should have been developed with a lower initial TAL and should have included quota reductions every year thereafter. In addition, the quota allocated for the Full-Time Tier 1 category should be reduced by 60 percent and that any research set aside should be allocated no more than 0.5 percent of the TAL.

*Response:* The tilefish stock rebuilding schedule was implemented to provide a constant harvest strategy that would significantly reduce fishing mortality every year throughout the 10-year rebuilding time frame. This schedule has at least a 50-percent probability of rebuilding the stock within the rebuilding time frame. This rebuilding strategy fully complies with the Magnuson-Stevens Act. The quota allocated to various limited access permit categories reflects the percentage of the overall tilefish landings from 1988 through 1998 by vessels qualifying for each permit category. This management scheme was adopted by the Council and later approved by the Secretary. The final rule implementing the FMP incorporated the provisions contained in the Council's omnibus Framework Adjustment 1 (66 FR 42156; August 10, 2001), which allowed the Council to recommend a research set aside (RSA) up to 3 percent of the yearly tilefish TAL. The Council's recommendation, and the RSA ultimately implemented by NMFS, provided a means to compensate valuable research, the results of which will accrue to the benefit of the tilefish resource and those dependent on it.

*Comment 2:* The commenter supported reinstating the tilefish permit categories, but contested the percentage of the quota allocated to the limited access permit categories in the FMP. The commenter alleged that the percentages do not reflect the historical landings of the current participants in each permit category. The commenter suggested that the Council should reassess the basis used to calculate the allocation percentages for the limited access permit categories.

*Response:* The Court Order set aside the vessel permit requirements at § 648.4(a)(12). The only focus of this rule is to reinstate this section of the regulations. This comment relates to the percentage of the quota that is allocated

to the limited access permit categories. These percentages are specified at § 648.290. Therefore, this comment is outside the scope of this rulemaking. A separate Council action, either through a framework adjustment or amendment to the FMP, and rulemaking by NMFS, would be required to modify the percentage of the quota allocated to the limited access permit categories.

### Changes From the Proposed Rule

In § 648.2, the definition for "Fishing year" is revised to include the fishing year for the tilefish fishery by including the phrase, "For the tilefish fishery, from November 1 through October 31 of the following year."

In § 648.4(a)(12)(ii), the reference to the regulations specifying the tilefish trip limits contained at § 648.252 is revised to read § 648.292 to correct this reference to the tilefish trip limit regulations.

### Classification

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

Included in this final rule is the Final Regulatory Flexibility Analysis (FRFA) that contains the items required by 5 U.S.C. 604(a). The FRFA consists of the Initial Regulatory Flexibility Analysis (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 in its entirety here.

### Final Regulatory Flexibility Analysis

#### *Statement of Objective and Need*

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

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

Comments received prior to the close of the comment period for the proposed rule focused on the measures contained within the proposed rule and did not reference the analysis contained in the IRFA or the economic impacts of the rule. For a summary of the comments received, refer to "Comments and Responses" in the preamble of this final rule.

*Description and Estimate of the Number of Small Entities to Which the Rule Will Apply*

A description and estimate of the number of small entities to which the rule will apply is provided in the IRFA and IRFA summary contained in the Classification section of the proposed rule and is only summarized here.

The universe of vessels impacted by this action are those vessels that qualified for a limited access permit under the requirements established in the FMP, and those vessels that hold an incidental tilefish permit. A total of 32 vessels qualified for limited access permits under the limited access criteria established in the FMP. In addition, there are currently 1,650 vessels that held an open access Incidental tilefish permit prior to the Court Order. However, vessels have not been required to obtain any Federal permit to land tilefish since the Court Order. Therefore, a precise assessment of the number of vessels landing tilefish as incidental catch is not possible at this time. All of the affected businesses (fishing vessels) are considered small entities under the standards described by the Small Business Administration.

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

There are no recordkeeping, reporting, or other compliance costs forthcoming from this action.

*Steps Taken to Minimize Economic Impacts on Small Entities*

Management measures contained in this action would not alter the determinations made in the FEIS and described in the FMP. Section 4.9.3 of the FMP provides an analysis of the economic impacts resulting from the various quota alternatives and limited entry alternatives considered in the FMP. The FMP considered six limited entry alternatives as a means of controlling effort in the tilefish fishery. Each of these alternatives consisted of at least two different limited access categories, Full-time and Part-time, having different qualifying criteria. The alternatives are summarized as follows:

**Option 1:** Part-time – At least 10,000 lb (4,536 kg) in 1 year 1988–1993, and at least 10,000 lb (4,536 kg) in 1 year between 1994–1998; Full-time - At least 50,000 lb (22,680 kg) in 1 year 1988–1993, and at least 25,000 lb (11,340 kg) per year for 2 years during 1994–1998.

**Option 2:** Part-time – Same as Option 1; Full-time, Tier 1 - At least 250,000 lb (113,400 kg) per year for 3 years between 1993–1998, and at least 1 lb

(0.45 kg) of tilefish landed prior to the June 15, 1993, control date; Full-time, Tier 2 - At least 30,000 lb (13,608 kg) per year for 3 years 1993 and 1998, and at least 1 lb (0.45 kg) of tilefish landed prior to the June 15, 1993, control date.

**Option 3:** Part-time – At least 10,000 lb (4,536 kg) in 1 year between 1988 and June 15, 1993; Full-time - Same as Option 1.

**Option 4:** Part-time – Same as Option 3; Full-time - At least 50,000 lb (22,680 kg) in 1 year between 1988 and June 15, 1993.

**Option 5:** Part-time – At least 10,000 lb (4,536 kg) in 1 year between 1977 and June 15, 1993; Full-time - At least 50,000 lb (22,680 kg) in 1 year between 1977 and June 15, 1993.

**Option 6:** Part-time – Same as Option 1, or 28,000 lb (12,701 kg) in 1 year between 1984 and 1993; Full-time, Tier 1 - Same as Option 2; Full-time, Tier 2 - Same as Option 2.

The Council's preferred alternative was Option 6, which was made effective through the final rule implementing the FMP. This final rule reinstates Option 6. This action minimizes the economic impacts of the overall TAL established in the FMP by dividing the TAL among the vessels that qualify under each limited access category. This enables those vessels that are dependent on the tilefish fishery (those vessels in the Full-time, Tier 1 category) to continue to harvest their share of the annual TAL in a manner that maximizes their total revenues. Furthermore, by maintaining the incidental catch limit of 5 percent of the yearly TAL and by distributing the remaining 2004 tilefish TAL among the limited access vessels as specified above, any increase in incidental tilefish landings resulting from the Court Order will not affect the ability of limited access vessels to land their portion of the yearly TAL.

If the limited entry program were not reinstated, those vessels that are dependant on the tilefish resource would be faced with the uncertainty of when the overall quota would be harvested, forcing them to fish in a manner that would not maximize their total revenues. Furthermore, in the absence of a limited entry program, a derby fishery for tilefish could occur. A derby fishery could result in large quantities of tilefish entering the market, reducing the price received by the vessel, and reducing total revenues. A derby fishery would also increase safety concerns.

**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 action 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 tilefish permits. The guide will also 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**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 20, 2004.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, 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 § 648.2, the definition for "Fishing year" is revised to read as follows:

**§ 648.2 Definitions.**

\* \* \* \* \*

**Fishing year means:**

(1) For the Atlantic sea scallop and Atlantic deep-sea red crab fisheries, from March 1 through the last day of February of the following year.

(2) For the NE multispecies, monkfish and skate fisheries, from May 1 through April 30 of the following year.

(3) For the tilefish fishery, from November 1 through October 31 of the following year.

(4) For all other fisheries in this part, from January 1 through December 31.

\* \* \* \* \*

■ 3. In § 648.4, paragraph (a)(12)(ii) is revised to read as follows:

**§ 648.4 Vessel permits.**

(a) \* \* \*

(12) \* \* \*

(ii) *Tilefish incidental catch permit.* A vessel of the United States that is subject to these regulations and that has not been issued a limited access tilefish

permit is eligible for and may be issued a tilefish incidental catch permit to possess or land tilefish in or from the tilefish management unit. Such vessel is subject to the restrictions in § 648.292.

\* \* \* \* \*

**§ 648.14 [Amended]**

■ 4. In § 648.14, paragraph (cc)(6) is removed and reserved.

**§ 648.294 [Removed and reserved]**

■ 5. Section 648.294 is removed and reserved.

[FR Doc. 04-9438 Filed 4-23-04; 8:45 am]

**BILLING CODE 3510-22-S**