

We further reviewed our fatal hardcopy case files<sup>24</sup> and could not identify a single case where the roof rack appeared to aggravate the deformation of the roof structure. 74 FR 22372.

*Discussion about repeatability of test dummy and initial restraint positioning.* We included a discussion in Appendix A of the final rule stating that because the JRS is spinning prior to initiating the vehicle test, there are concerns about how to establish the initial belt position on the test dummy in a manner that is consistent with real world conditions. We stated that the lateral acceleration prior to rollover initiation can cause a belted occupant to introduce slack in the belt. We stated that there is also the additional complication of the timing for firing the rollover curtains and/or pretensioners in the JRS pre-spin cycle.

CfIR stated that this is a reference to the CRIS test and is not appropriate to the JRS. However, we believe the language cited by CfIR as incorrect is ambiguous as the vehicle spins in the JRS just prior to impact with the roadway surface, where the CRIS has the vehicle spinning at full velocity prior to impact with the ground. Therefore, both the JRS and CRIS have the vehicle in a pre-spin prior to impact with the road surface.

#### D. Conclusion

For the reasons discussed above, we deny the petitions for reconsideration submitted by Advocates *et al.* and CfIR.

**Authority:** 49 U.S.C. 322, 30111, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

Issued: April 2, 2010.

**Stephen R. Kratzke,**

Associate Administrator for Rulemaking.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 0909101271-91272-01]

RIN 0648-AY23

### Fisheries of the Northeastern United States; Black Sea Bass Recreational Fishery; Emergency Rule Correction and Extension

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rules; correcting amendment and emergency action extension.

**SUMMARY:** NMFS is taking two actions through this rule: Correcting regulations in the October 5, 2009, emergency rule that closed the recreational black sea bass fishery in the Federal waters of the Exclusive Economic Zone (EEZ) from 3 to 200 nautical miles offshore, north of Cape Hatteras, NC; and extending of that initial closure. This action is necessary to both correct the implementing regulations of the initial closure that were inadvertently implemented with no end date, and to extend the prohibition on recreational fishing for black sea bass in the EEZ beyond the expiration of the initial closure period. The intent of the correction is to correct the regulatory language of the initial closure, thereby establishing an end date for the initial closure period, consistent with the intent of the initial rule. The intent of the emergency closure extension is to ensure that recreational mortality does not occur between the end date of the closure as specified in the correcting action of this rule, and the start of the 2010 black sea bass recreational fishery season recommendations of both the Mid-Atlantic Fishery Management Council (Council) and Atlantic States Marine Fisheries Commission (Commission).

**DATES:** Amendments to §§ 648.142 and 648.145 in amendatory instructions 2 through 4 are effective April 7, 2010, and the amendment to § 648.142 in amendatory instruction 5 is effective April 8, 2010 through 11:59 p.m., May 21, 2010.

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

#### SUPPLEMENTARY INFORMATION:

##### Correction Rule

NMFS published an emergency rule to close Federal waters of the EEZ from 3 to 200 nautical miles offshore, north of Cape Hatteras, NC, to black sea bass recreational fishing in the *Federal Register* effective October 5, 2009 (74 FR 51092), for a period of 180 days. This closure was necessary as the information available indicated that the 2009 Recreational Harvest Limit (RHL), the annual catch level established for the recreational fishery, had been exceeded by a considerable amount. Subsequent to the closure implementation, information from the NMFS Marine Recreational Fisheries Statistics Survey (MRFSS) through

August 2009 indicated black sea bass landings were 1,944,303 lb (882 mt). This exceeded the 2009 RHL of 1,137,810 lb (516 mt) by 71 percent.

An error occurred in promulgating the October 5, 2009, emergency closure rule. The rule was published in the **Federal Register** without specification of when the 180-day effective period would end. The rule became effective on October 5, 2009, and will remain in effect until modified by subsequent rulemaking. While NMFS clearly intended that the closure remain in effect for 180 days, consistent with the authority provided in section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the lack of a published end date has been confusing to stakeholders, implements a regulation that would exceed the underlying authority used to implement the closure, and requires correction. Thus, this action is correcting the October 5, 2009 (74 FR 51092), rule so that the 180-day period end date of April 12, 2010, is provided, as originally intended by NMFS and consistent with the emergency authority in the Magnuson-Stevens Act.

#### Temporary Emergency Rule Extension

At the time of the initial emergency closure, NMFS, the Council, and Commission were in the process of finalizing 2010 black sea bass specifications (i.e., RHL and commercial fishery quota) and would be undertaking the initial phases of 2010 black sea bass recreational management measures shortly thereafter. It was not known exactly what the 2010 specifications would be when the closure was implemented, but the preliminary information available suggested that recreational landings in 2010 would have to be reduced from 2009 levels to ensure the 2010 RHL would not be exceeded. Thus, NMFS implemented a 180-day closure rather than implementing a closure effective only until the end of the 2009 fishing year. The expectation at the time of the closure was that the Council and Commission's joint management process for recommending recreational measures would occur through November and December 2009, with a final recommendation for managing the 2010 recreational black sea bass provided to NMFS early in 2010 for review, analysis, and rulemaking. Several unforeseen events have transpired in the interim since the initial closure was implemented on October 5, 2009. These events have made the 2010 black sea bass recreational management measures

<sup>24</sup> See Docket Number NHTSA 2005-22143-56: Roof Crush Analysis Using 1997–2001 NASS Case Review.

development process more lengthy and more complex than anticipated, outlined as follows.

In December 2009, the Council and Commission developed recommended management measures for the 2010 recreational fishery. The measures were designed to achieve a 66-percent reduction in landings from projected 2009 levels, which was consistent with the black sea bass RHL of 1,137,810 lb (516 mt) previously adopted by the Council and Commission. The 66-percent reduction was calculated using 2009 landings data from Waves 1–4 (January–August), and projected landings for Waves 5 and 6 (September–December), as data for Waves 5 and 6 were not available at the time the Council and Commission met.

On December 22, 2009, NMFS published a final rule implementing the specifications for the 2010 black sea bass fishing year. These specifications, effective January 1, 2010, included total allowable landings (TAL) for black sea bass of 2.3 million lb (1,043 mt), of which 1,137,810 lb (516 mt) was allocated to the recreational fishery as the RHL. This TAL and RHL was consistent with the recommendations of the Council and Commission.

In early January 2010, the Council's Scientific and Statistical Committee (SSC) convened to reconsider their previous recommendations regarding the Acceptable Biological Catch (ABC) for black sea bass for the 2010 fishing year. The SSC concluded that the ABC for black sea bass could be increased from 2.71 million lb (1,229 mt) to 4.5 million lb (2,041 mt), which was consistent with catch levels established for 2008.

In response, on January 15, 2010, the Council submitted a letter to NMFS requesting that the agency take emergency action to increase the black sea bass TAL for 2010 consistent with the revised ABC. The letter requested that NMFS increase both the 2010 commercial quota and RHL for black sea bass.

On February 10, 2010, in response to the Council's request, NMFS published an emergency rule to increase the 2010 black sea bass TAL from 2.3 million lb (1,043 mt) to 3.7 million lb (1,678 mt), and to increase the RHL to 1,830,390 lb (830 mt) (the commercial quota was also increased to 1,758,610 lb (798 mt)).

In mid-February 2010, the Commission and Council met separately to reconsider the recreational fishery management measures developed in December 2009. The measures adopted in December 2009 were designed to achieve a 66-percent reduction in black sea bass landings relative to 2009, but

with the increased RHL implemented in the emergency rule, only a 44-percent reduction appeared necessary. Both the Council and Commission retained the status quo minimum fish size of 12.5 inches (31.75 cm) and 25-fish bag limit, but the two groups adopted different seasons. The Commission adopted a single season from May 22–September 12, and the Council recommended a split season from May 22–August 8 and September 4–October 4. Both sets of measures are projected to achieve the target 44-percent reduction in landings.

NMFS is currently reviewing the recommendations made by the Council for the 2010 black sea bass recreational fishery. The Council initially submitted for review materials analyzing the recommendations and alternatives reviewed in December 2009; however, on March 3, 2010, the Council submitted an addendum to include the new recommendation developed at its February 2010 meeting. NMFS is currently developing a proposed rule for summer flounder, scup, and black sea bass recreational fishing measures for the 2010 fishing year, and this proposed rule is expected to publish soon. With this rule, NMFS will solicit comments from the public on the Council's recommendations for the black sea bass recreational fishery, as well as other alternatives that may be available, and, once the public comment period is closed, will publish a final rule to implement the final management measures for 2010.

Absent this action, the emergency closure of the black sea bass recreational fishery would expire on April 12, 2010. However, both the Council and Commission have proposed fishing seasons that open on May 22, 2010. In order to preserve the fishing seasons proposed by both groups, and to ensure that the Federal management measures are consistent, to the maximum extent practicable, with state management measures, this action is necessary to extend the closure of the black sea bass recreational fishery through May 21, 2010.

The 44-percent reduction in landings utilized by both the Council and Commission to develop their February recommendations makes use of landings projections for both MRFSS 2009 Wave 5 and 6 (September–October and November–December, respectively). The calculations for this projection were performed by the Council's Black Sea Bass Monitoring Committee (Monitoring Committee). When the Monitoring Committee met in November 2009 to discuss black sea bass recreational management measures, it acknowledged that the closure likely had some impact

on landings, but that it could not quantify the impact at that time. The Monitoring Committee utilized a precautionary approach and assumed the EEZ black sea bass closure had no effect on landings because it was known that some level of fishing continued in state waters. It was expected that 2009 MRFSS Wave 5 data would be available in mid-December 2009, which would have allowed for a more informed analysis of the closure impacts on landings.

Issues related to sampling size and the telephone survey frame of the 2009 MRFSS Wave 5 have required extensive additional analyses. Thus, the data are not yet available to inform decisionmaking on 2010 black sea bass recreational fishery management measures. It is expected that the Wave 5 data will be available in April 2010, when the final 2009 MRFSS data are available. There is significant interest in how the Wave 5 data may differ from the projection used to derive the 44-percent reduction in landings utilized by the Council and Commission to 2010 black sea bass recreational management measures.

Preliminary 2009 MRFSS Wave 6 data are now available, and NMFS has incorporated these data into the analysis of 2009 recreational landings. The black sea bass fishery was closed in the EEZ for the entire Wave 6 timeframe in 2009. The preliminary Wave 6 data indicate that 2009 landings were approximately 75-percent lower than the 2008 Wave 6 level. NMFS has conducted additional projections that make use of the preliminary 2009 Wave 6 data in conjunction with different assumptions about the impact the EEZ closure had on landings between the October 6–31, 2009, period during Wave 5 2009. Based on these revised projections, it appears likely that the percent reduction in landings from 2009 levels necessary for 2010 may be less than 44 percent. NMFS anticipates being able to fully evaluate the 2009 Wave 5 data, when available, before a final rule for the 2010 black sea bass recreational management measures is implemented, and will adjust, as appropriate, the percent reduction in 2010 landings accordingly.

In the interim, it is necessary to extend the emergency closure of the recreational black sea bass fishery in the EEZ until 11:59 p.m., May 21, 2010, for several reasons. Even under the most liberalized projections for 2009 Wave 5, a reduction in landings remains necessary, and the magnitude required is sufficient to preclude fishing until May 22, 2010, the current preferred opening date for both the Council and Commission's 2010 recreational fishing

seasons. NMFS requires additional time to analyze the 2009 Wave 5 data and to confer with the Council, Commission, and the public regarding the final measures to be implemented for 2010. By ensuring that the EEZ remains closed between April 12, 2010, and the start of the current Council and Commission-preferred season start date of May 22, 2010, NMFS can ensure that these additional considerations occur in an open and transparent manner. The correction and extension implemented by this action will also help avoid confusion on when fishing may resume in the EEZ, and should provide a date certain for the season to begin for business and angler planning purposes. The actions of this rule build a necessary bridge to the planned notice-and-comment rulemaking that will be conducted to establish the final 2010 black sea bass recreational management measures. A proposed rule is anticipated in April 2010, with final rulemaking anticipated for June.

#### Comments and Responses

A 30-day public comment period was provided on the initial 180-day closure rule. NMFS did not receive any specific comments relating to a potential extension of the initial 180-day closure. The initial closure was highly controversial and a great deal of negative reaction was received through telephone calls, e-mail, correspondence, and in the press through various media. Many of the individuals providing feedback stated surprise that the closure was being implemented, took exception to the use of MRFSS data as the basis for the overage calculations, and discussed negative socio-economic impacts related to the closure. Others stated that the closure had no biological basis, as the stock was not subject to overfishing. Litigation has been filed (*UNITED BOATMEN ET AL. v. LOCKE ET AL.*, Case 3:09-cv-05628-JAP-LHG) that seeks, among other things, a prohibition on utilizing MRFSS data to inform inseason recreational management actions. The full scope of complaints registered by the public regarding the initial 180-day closure appear in the plaintiff's motion for relief and, as such, NMFS will respond to them through the litigation process in briefs to the court. Some may find the extension of the emergency action controversial; however, extending the closure is necessary as previously outlined.

#### Classification

The Administrator, Northeast Region, NMFS, determined that this emergency rule extension is necessary for the

conservation and management of the black sea bass fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

The Assistant Administrator for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C. 553(d)(3) to make this rule effective immediately, thereby waiving the 30-day delayed effective date required by 5 U.S.C. 553(d). The Assistant Administrator also finds it is unnecessary and contrary to the public interest to provide any additional notice and opportunity for public comment under 5 U.S.C. 553(b)(B) prior to publishing the emergency rule extension.

The need to correct the initial emergency rule language to specify an end date and to extend this emergency closure action for an additional 39 days was not evident until February 24, 2010, when the Council notified NMFS of its intent to prepare an addendum to its initial recommendation for 2010 black sea bass recreational management measures. Prior to this date, it was unknown what course of action was likely for the 2010 fishing season and if the Council-preferred action would require extension of the 180-day closure. In examining options for extending the closure to better synchronize with the Council and Commission-preferred season opening dates, NMFS became aware of the error in the initial emergency closure rule that lacked an end date, despite the lapse in authority provided by the Magnuson-Stevens Act, effective April 12, 2010.

Typically, the process for recreational management measures begins with a joint-Council and Commission meeting in early December; a formal recommendation is conveyed to NMFS, including appropriate analyses, in late January or early February, and rulemaking is conducted with a June 1 target implementation date. However, the 2010 process has been more complex and lengthy than usual. The Council's SSC provided an increased ABC recommendation in early January 2010, NMFS conducted emergency rulemaking to increase the 2010 black sea bass TAL (including increased RHL) and both the Council and Commission, who co-manage black sea bass in state and Federal waters, respectively, had separate meetings in early February 2010 wherein new recreational management measure recommendations were adopted. As a result, both groups have conducted analysis that indicate that 2010 black sea bass recreational harvest should be decreased by 44 percent from 2009 levels. To achieve

this reduction, both the Council and Commission have recommended seasons that will begin no earlier than May 22, 2010. These recommendations were not formalized until recently.

Extension of the emergency closure was developed as expeditiously as possible; however, it was not foreseeable that the extension would be necessary until the last week of February 2010, nor was it evident that the initial 180-closure rule needed to be corrected until NMFS undertook a more detailed examination of how the Code of Federal Regulations was modified by the initial closure.

It is now evident that the initial emergency closure contained an error by not specifying April 12, 2010, as the end of the 180-day period, and, that it must be corrected. The 2010 recreational management measures process has unfolded sufficiently to make it evident that the existing recreational closure of the EEZ must remain effective until at least May 22, 2010, to ensure that the fishing mortality objectives for the 2010 recreational black sea bass fishery are not changed from the levels contained in the Council and Commission's analyses. If the initial emergency rule was not corrected, the EEZ closure would remain in effect indefinitely, despite the regulatory authority for the closure expiring on April 12, 2010. This would create a confusing and difficult situation for fishery participants. If the black sea bass recreational fishery were reopened in the EEZ effective April 12, 2010, the current expiration date of the initial 180-day closure, it is expected that recreational fishing would resume in the EEZ. The Council and Commission's preferred 2010 recreational management measures presume that no fishing will occur until at least May 22; thus, if the emergency closure is not extended by 39 days, the projections for 2010 fishing mortality will be violated. The additional mortality that would occur if fishing resumed prior to May 22 would require additional action by NMFS to further modify 2010 measures to ensure the required reduction in 2010 landings occurs. Moreover, implementation of recreational management measures would likely be further delayed while NMFS conducted additional analyses to understand the stock impacts of reopening the EEZ before the recommended May 22 date. Additional delays in the already complicated and delayed 2010 process would not benefit the angling public for planning purposes and would likely result in different measures in state and Federal waters, a situation that the Council and Commission have sought to avoid by

recommending similar measures for 2010.

Waiver of the 30-day delay in effectiveness period will ensure that the existing recreational black sea bass EEZ closure date will be clarified by the corrective action of this rule and that the closure will remain effective for an additional 39 days until 11:59 p.m., May 21, 2010. This will ensure that development of 2010 black sea bass recreational management measures will be based on the most up-to-date data, and that the mortality objectives are not compromised by reopening the fishery before the Council and Commission preferred start date of May 22. Furthermore, the correction and extension of the closure provides a date certain for the start of the 2010 fishing season so that the interested public and fishery-dependent businesses can plan accordingly. It was not practicable to promulgate the correction and extension more expediently, given the unforeseen circumstances outlined in the preamble to this rule. Public comment was solicited on the initial 180-day emergency rule, as outlined in the preamble. For the reasons outlined herein, it is contrary to the public interest to provide any additional notice and opportunity for public comment

under 5 U.S.C. 553(b)(B) prior to publication of this emergency rule extension.

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

This rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is not subject to the requirement to provide prior notice and opportunity for public comment pursuant to 5 U.S.C. 553 or any other law.

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

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 1, 2010.

**Eric C. Schwaab,**

*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.*

#### § 648.142 [Corrected]

- 2. In § 648.142, remove “may not possess” and add in its place “may possess”.
  - 3. In § 648.142, remove “after October 5, 2009” and add in its place “from January 1, 2010 through December 31, 2010”.
- § 648.145 [Corrected]**
- 4. In the first sentence of § 648.145 paragraph (a), remove the phrase “black sea bass after October 5, 2009” and add in its place “more than 25 black sea bass”.
  - 5. In § 648.142, the existing text of the paragraph is suspended, and paragraph § 648.142(a) and (b) are added to read as follows:

#### § 648.142 Time restrictions.

(a) Vessels that are not eligible for a moratorium permit under § 648.4(a)(7), and fishermen subject to the possession limit, may not possess black sea bass from April 8, 2010 through 11:59 p.m., May 21, 2010, unless this time period is adjusted pursuant to the procedures in § 648.140.

(b) [Reserved]

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