

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100804323–0569–02]

RIN 0648–BA03

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Specifications and Management Measures

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

ACTION: Final rule.

SUMMARY: This final rule implements 2011 specifications and management measures for the Atlantic mackerel, squid, and butterfish (MSB) fisheries. Specifically, this action sets quotas for the MSB fisheries, modifies the measure that transfers *Loligo* squid (*Loligo*) quota underages from Trimester I to Trimesters II and III by limiting the Trimester II quota increase to no more than 50 percent, and revises the 72-hr pre-trip observer notification requirement for the *Loligo* fishery to accommodate vessels departing for multiple day trips in a week. These specifications and management measures promote the utilization and conservation of the MSB resource.

DATES: Effective February 14, 2011.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901.

The EA/RIR/IRFA is accessible via the Internet at <http://www.nero.noaa.gov>. NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of this rule. Copies of the FRFA and the Small Entity Compliance Guide are available from: Patricia Kurkul, Regional Administrator, National Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930–2276, or via the Internet at <http://www.nero.noaa.gov>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to NMFS, Northeast Regional Office, and by e-mail to OIRA_Submission@omb.eop.gov, or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Aja Peters-Mason, Fishery Policy Analyst, 978–281–9195, fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

Regulations implementing the MSB Fishery Management Plan (FMP) appear at 50 CFR part 648, subpart B. Regulations governing foreign fishing appear at 50 CFR part 600, subpart F. The regulations at §§ 648.21 and 600.516(c) require that NMFS, based on the maximum optimum yield (Max OY) of each fishery, as established by the regulations, annually publish a rule specifying the amounts of the initial optimum yield (IOY), allowable biological catch (ABC), domestic annual harvest (DAH), and domestic annual processing (DAP), as well as, where applicable, the amounts for total allowable level of foreign fishing (TALFF) and joint venture processing (JVP) for the affected species managed under the FMP. In addition, these regulations allow specifications to be specified for up to 3 years, subject to annual review. The regulations at

§ 648.21 also specify that IOY for *Illex* and *Loligo* squid is equal to the combination of Research Set-Aside (RSA) and DAH, with no TALFF specified for squid. For butterfish, the regulations specify that a butterfish bycatch TALFF will be specified only if TALFF is specified for mackerel.

At its June 8–10, 2010, meeting in New York, NY, the Council recommended MSB specifications for the 2011 fishing year. The Council considered the recommendations made by its Monitoring Committee and Scientific and Statistical Committee (SSC). The SSC recommends ABC. SSC advice accounts for scientific uncertainty regarding stock status and biological reference points in recommending the ABC, and the Council relies on that ABC recommendation to set other specifications. In addition to 2011 specifications for each of the MSB species, the Council recommended a modification to the provision that transfers Trimester I quota underages to Trimesters II and III for the *Loligo* fishery. The Council submitted these recommendations, along with the required analyses, for agency review on July 19, 2010, with final submission on September 23, 2010. A proposed rule for the 2011 MSB specifications and management measures was published on November 17, 2010 (75 FR 70187), and the public comment period for the proposed rule ended on December 17, 2010. Details concerning the Council’s development of these measures were presented in the preamble of the proposed rule and are not repeated here.

Final MSB Specifications and Management Measures for the 2011 Fishing Year

This action implements the following MSB specifications and management measures for the 2011 fishing year, which are described in detail below.

TABLE 1—FINAL SPECIFICATIONS, IN METRIC TONS (MT), FOR ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FOR 2011 FISHING YEAR

Specifications	<i>Loligo</i>	<i>Illex</i>	Mackerel	Butterfish
Max OY	32,000	Unknown	Unknown	Unknown
ABC	24,000	24,000	47,395	1,500
IOY	20,000	23,328	46,779	500
DAH	¹ 19,906	23,328	² 46,779	³ 495
DAP	19,906	23,328	31,779	495
JVP	N/A	N/A	0	0
TALFF	N/A	N/A	0	0

¹ Excludes 94 mt for RSA.

² Includes a 15,000-mt catch of Atlantic mackerel by the recreational fishery.

³ Excludes 5 mt for RSA.

Atlantic Mackerel

This action specifies the mackerel ABC at 47,395 mt, based on the formula $ABC = T - C$. T, or total annual catch, is the yield associated with a fishing mortality rate that is equal to the target fishing mortality rate (F). The Transboundary Resources Advisory Committee (TRAC) could not establish biomass reference points or target F at its March 2010 mackerel stock status assessment, and recommended that total annual catches not exceed the average total landings (80,000 mt) over the last 3 years (2006–2008) until new information is available. C is the estimated catch of mackerel in Canadian waters (32,605 mt) for the upcoming fishing year. Thus 80,000 mt minus 32,605 mt results in the 2011 mackerel ABC of 47,395 mt. The 2010 TRAC assessment estimated that U.S. mackerel discards from 2004–2008 (the most recent years for which complete data are available) accounted for 1.3 percent of total catch. Thus NMFS is specifying the mackerel IOY and DAH at 46,779 m (ABC minus 616 mt for discards). The DAH includes commercial harvest plus the 15,000 mt available for the recreational fishery.

While a surplus existed between ABC and DAH for many years, that surplus has disappeared due to downward adjustments of the specifications in recent years. Analysis of the state of the world mackerel market and possible increases in U.S. production levels concluded that specifying an IOY resulting in zero TALFF will yield positive social and economic benefits to both U.S. harvesters and processors, and to the Nation. For these reasons NMFS is specifying IOY at level that can be fully harvested by the domestic fleet (46,779 mt), thereby precluding the specification of a TALFF, in order to support the U.S. mackerel industry.

This action maintains JVP at zero. In the past, the Council recommended a JVP greater than zero because it believed U.S. processors lacked the ability to process the total amount of mackerel that U.S. harvesters could land. However, for the past 7 years, the Council has recommended zero JVP because U.S. shoreside processing capacity for mackerel has expanded. The Council concluded that processing capacity was no longer a limiting factor relative to domestic production of mackerel, even at the higher DAP of 100,000 mt; this is even more true with the specified DAP of 31,779 mt. The differential between the DAH and the DAP reflects a projection that the recreational mackerel fishery will land 15,000 mt.

*Atlantic Squids**Loligo*

This action specifies a *Loligo* Max OY of 32,000 mt, an ABC of 24,000 mt, an IOY of 20,000 mt, an RSA of 94 mt, and a DAH and DAP of 19,906 mt. The FMP does not authorize the specification of JVP and TALFF for the *Loligo* fishery because of the domestic industry's capacity to harvest and process the OY for this fishery; therefore, there will be no JVP or TALFF in 2011.

Distribution of the *Loligo* DAH

As was done in fishing years 2007 through 2010, this action allocates the 2011 *Loligo* DAH into trimesters, according to percentages specified in the FMP, as follows:

TABLE 2—TRIMESTER ALLOCATION OF LOLIGO QUOTA IN 2011

Trimester	Percent	Metric tons ¹
I (Jan–Apr)	43	8,560
II (May–Aug)	17	3,384
III (Sep–Dec)	40	7,962
Total	100	19,906

¹ Trimester allocation after 94-mt RQ deduction.

For the 2010 fishing year, Trimester I *Loligo* underages greater than 25 percent of the Trimester I quota were distributed evenly between Trimesters II and III. The Council expressed concern that the butterflyfish mortality cap on the *Loligo* fishery, established in 2010 by Amendment 10 to the FMP (Amendment 10) (75 FR 11441, March 11, 2010), could result in a substantial Trimester I underage if the *Loligo* fishery is closed because the Trimester I butterflyfish catch cap is reached. Under the 2010 underage distribution scheme, this could result in a large roll-over of *Loligo* quota to Trimester II, when the butterflyfish catch cap cannot close the fishery. Therefore, this action limits the roll-over of quota from Trimester I to Trimester II to no more than 50 percent of the Trimester II allocation. This adjustment will continue to prevent an underharvest of the annual quota by distributing the quota across the remaining trimesters, while reducing management uncertainty related to the implementation of the butterflyfish mortality cap for the *Loligo* fishery.

Adjustment to the *Loligo* Pre-trip Trip Notification Requirement

The action changes the 72-hr pre-trip observer notification requirement established through Amendment 10 for vessels issued a *Loligo* and butterflyfish

moratorium permit. Such vessels intending to land more than 2,500 lb (1.13 mt) of *Loligo* are now required to notify the NMFS Northeast Fishery Observer Program (NEFOP) at least 72 hr, but not more than 10 days before embarking on a *Loligo* trip. This adjustment is intended to reduce the burden of this requirement for vessels that embark on multiple trips that last less than 24 hr during a single week by allowing them to notify for several upcoming trips at one time.

Illex

This action specifies the *Illex* ABC as 24,000 mt, and specifies IOY, DAH, and DAP as 23,328 mt to account for discards, which were estimated as 2.8 percent of total catch in the last assessment. The FMP does not authorize the specification of JVP and TALFF for the *Illex* fishery because of the domestic fishing industry's capacity to harvest and to process the IOY from this fishery.

Butterfish

This action specifies the butterflyfish ABC at 1,500 mt, and the IOY at 500 mt, and DAH and DAP at 495 mt. Additionally, consistent with MSB regulations, the Council recommended, and this action is specifying, zero TALFF for butterflyfish because zero TALFF is specified for mackerel.

Amendment 10 created a butterflyfish mortality cap for the *Loligo* fishery, which is equal to 75 percent of the butterflyfish ABC. Thus, this action sets the butterflyfish mortality cap at 1,125 mt. If the portion of the butterflyfish mortality cap allocated to Trimester I (January–April) or Trimester III (September–December) is harvested, the directed *Loligo* fishery will close for the remainder of that trimester.

Comments and Responses

NMFS received seven comments from industry entities: Three from the Garden State Seafood Association (GSSA), submitted on behalf of several fishery organizations; one from Lund's Fisheries, Incorporated; one submitted on behalf of Seafreeze, Ltd.; one from Top Catch, Inc.; and one from TrawlWorks, Inc. In addition, there was one form letter submitted with signatures from 73 individuals. Some commenters identified issues that are not related to this action; only comments related to the proposed specifications are responded to below.

Comment 1: All of the industry groups and the 73 individuals who commented through the form letter stated their opposition to the proposed specifications for butterflyfish, due to the butterflyfish mortality cap specified for the

Loligo fishery. Most of these commenters noted that the butterflyfish stock assessment results produced by the Northeast Fisheries Science Center's 49th Stock Assessment Workshop (SAW 49) did not include a finding that overfishing was occurring, and did not attribute the butterflyfish stock decline to fishing mortality. All of the commenters expressed concern about the restrictive butterflyfish mortality cap, given the uncertainty in the butterflyfish stock assessment results produced by SAW 49, arguing that the uncertainty means the level specified for the cap cannot be justified.

All of the commenters expressed concern that the butterflyfish mortality cap will be attained, and that participants in the *Loligo* fishery will be precluded from fully harvesting the *Loligo* quota, causing unnecessary economic harm to participants in the *Loligo* fishery. GSSA and Lunds both requested that NMFS consider the potential loss of income that will occur in Mid-Atlantic communities. GSSA, Lunds, Top Catch, Inc., and the form letter stated the view that measures to regulate butterflyfish, a bycatch species with a 3-year lifespan, should not control the \$50-million *Loligo* fishery. TrawlWorks stated that *Loligo* harvesters will be particularly impacted if the butterflyfish mortality cap is attained in the fall, and the *Loligo* fishery is closed when *Loligo* is usually abundant. GSSA noted that the decline in butterflyfish stock abundance is unrelated to the recent rate of *Loligo* fishing, and that the economic losses that would result from closure of the *Loligo* fishery would be much greater than any potential benefit to the butterflyfish resource.

GSSA, Lunds, Top Catch, Inc., and the form letter specifically requested NMFS to specify the butterflyfish ABC at 4,445 mt, a level the commenters claimed is justified based on the best available science. GSSA, Lunds, and Top Catch stated their view that this level was identified by the SSC as a safe, scientifically justified harvest level. The form letter also stated that it is unjustified to use a precautionary approach when specifying butterflyfish ABC in light of the uncertainty in the recent assessment. The commenters expressed the view that guesswork was used to quantify butterflyfish predation mortality. GSSA and Lunds stated their view that the range of ABCs considered valid by the SSC included a 25,000-mt option that was risk-neutral; therefore, they concluded that the ABC of 1,500 mt seems excessively precautionary. GSSA and Lund's pointed out that the butterflyfish ABC was set at 4,545 mt in 2007, and that the reduction of ABC to

1,500 mt in 2008 was made at a time when no new assessment data were available, in an effort to discourage a directed butterflyfish fishery. GSSA stated the view that SAW 49 determined that butterflyfish were not overfished, nor were they overfished in the past; therefore, the 1,500-mt ABC is based on erroneous information. They argued that setting the ABC at 4,445 mt is more scientifically sound, and appropriately risk averse.

Seafreeze stated that the 2011 butterflyfish specifications violate National Standard 1 because the butterflyfish quota prevents a directed butterflyfish fishery from occurring, and the butterflyfish mortality cap would result in the premature closure of the *Loligo* fishery. Thus, they concluded that the butterflyfish specifications will prevent the *Loligo* fishery from achieving optimum yield, in violation of National Standard 1. Seafreeze also stated that the specifications violate National Standard 2 because they ignore the best available science, namely the most recent NEFSC bottom trawl survey results. Seafreeze claimed that the Autumn 2009 and Spring 2010 bottom trawl surveys both showed butterflyfish catches comparable to the period from 1980–1990 when butterflyfish biomass was estimated at 125,000–150,000 mt, therefore indicating that the butterflyfish stock can sustain an ABC of 20,000 mt. They stated that, because the life span of butterflyfish is about 3 years, it is imperative to use this recent trawl survey data. Seafreeze suggested that NMFS should reject the proposed specifications, reassess the butterflyfish stock based on trawl survey data, and establish a butterflyfish ABC that will allow for a directed butterflyfish fishery.

GSSA noted that the 2004 SARC only had abundance estimates based on survey data from the R/V *Albatross*, and that calibration exercises since that time, that compare R/V *Albatross* data with new data from the R/V *Bigelow*, shows that that butterflyfish catch data from the R/V *Albatross* were biased low. They stated that, in their view, the SAW 49 estimated 2008 butterflyfish biomass of 88,800 mt would indicate that setting the butterflyfish ABC at 20,000 mt will result in no risk to the stock.

GSSA further asserted that the lack of reference points for the butterflyfish stock, the fact that butterflyfish predation mortality far surpasses fisheries mortality, and the fact that the Autumn 2010 bottom trawl survey results have yet to be compiled, all indicate that there is no information to inform abundance projections for butterflyfish for 2011, making any management action arbitrary and unsupported by science.

GSSA also stated that recent downward trends in the butterflyfish stock may be due to increased predation. They believe that, because predation mortality is high and because *Loligo* squid is a major butterflyfish predator, management measures that promote the utilization of the *Loligo* resource may actually be beneficial to the butterflyfish stock.

Response 1: The MSB FMP and its implementing regulations require the specification of the butterflyfish ABC, and the resulting butterflyfish mortality cap. NMFS acknowledges that SAW 49 did not produce approved biological reference points, and thus did not make a formal determination that the butterflyfish stock is currently overfished. The stock assessment concluded that fishing mortality has been declining over time, and has been very low in recent years. However, SAW 49 also recommended that point estimates of both biomass and fishing mortality should be interpreted with caution, and noted that the biological reference points could not be estimated because the stock does not appear to be at equilibrium. It also concluded that the stock assessment appropriately reflected stock trends, demonstrating a convincing long-term decreasing trend in spawning stock biomass (SSB), with recent biomass estimates among the lowest in the time series.

While butterflyfish fishing mortality is low, and overfishing appears not to be occurring, the butterflyfish mortality cap was designed by the Council in Amendment 10 to minimize butterflyfish bycatch in the *Loligo* fishery, not to address overfishing. In addition to the butterflyfish mortality cap, Amendment 10 enacted a rebuilding program for butterflyfish. At the time Amendment 10 was being developed, the 2004 butterflyfish assessment (SAW 38) indicated that a reduction in fishing mortality may lead to improvements in the butterflyfish stock. The analysis in Amendment 10 noted that the butterflyfish mortality cap could be a tool to limit the portion of butterflyfish fishing mortality attributable to the *Loligo* fishery and, accordingly, may provide rebuilding benefits to the stock. Though more recent information provided in SAW 49 indicates that fishing mortality is low compared to natural mortality, and is likely not the driver of long-term declines in SSB, both SAW 38 and SAW 49 did determine that butterflyfish discards were equal to twice the annual landings. Amendment 10 identified the *Loligo* fishery as the predominate source of butterflyfish discards. Thus, Amendment 10 enacted the butterflyfish mortality cap as a permanent measure to

limit butterflyfish bycatch in the *Loligo* fishery.

Though there was considerable uncertainty in the recent assessment, including limited information about the causes of the butterflyfish stock decline, NMFS determined that there was no evidence presented that suggests that the status of the butterflyfish stock has improved since the 2004 SAW 38 assessment concluded that the stock was overfished. SAW 49 reviewers agreed that the status of the butterflyfish stock could not be determined based on the assessment. Several commenters argued that, in their view, the cap is overly precautionary, and that the uncertainty in the stock assessment results means it is inappropriate to be precautionary. NMFS disagrees that this is necessarily the case, and notes that this alone is insufficient basis for an increase to the butterflyfish ABC (and the resulting butterflyfish mortality cap).

NMFS notes that the SSC utilized the results of SAW 49 in making the recommendation for the ABC specified in this action. The alternate suggested values for ABC were not validated or endorsed by the SSC, as some commenters indicated. Because of uncertainty about butterflyfish stock size, and uncertainty about the potential response of the butterflyfish stock to fishing pressure, the Council staff generated a range of potential ABCs for consideration by the SSC. These ranged from 1,362 mt to 25,000 mt, and were developed using several different approaches. The 4,445-mt ABC (average catch from 1996–2008) and the 25,000-mt ABC (an F of 0.39 applied to a 45,000-mt stock) cited by the commenters were included in this range. While the SSC used this information from Council staff, in conjunction with SAW 49, to inform its final ABC recommendation, the range generated by Council staff was in no way binding for the SSC, nor was it endorsed by the SSC as appropriate or scientifically justified. There is no basis for the commenters' contention that these higher values are risk-averse or risk-neutral; there is no SSC conclusion to that effect. The SSC ultimately recommended 1,500 mt as the 2011 butterflyfish ABC because available information suggested that, provided improved environmental conditions affecting recruitment, the butterflyfish stock size could increase in the future if the 2011 ABC was maintained at this level. The SSC used the best scientific information available to it at the time it made its recommendation.

The commenters are correct that the butterflyfish ABC was set at 4,545 mt until 2007, but did not fully describe the

reason for the reduction of the ABC to 1,500 mt for subsequent years. Though no new stock assessment data were available leading up to implementation of the 2008 specifications (the action that first set the butterflyfish ABC at 1,500 mt, and IOY/DAH at 500 mt), the ABC and IOY were reduced to cap the fishery at recent levels (500 mt) to prevent any expansion of the directed fishery of butterflyfish while the stock is being rebuilt. At that time, the Council was developing measures for Amendment 10 to reduce butterflyfish discards and rebuild the stock.

NMFS disagrees that the butterflyfish specifications violate either National Standard 1 or National Standard 2. National Standard 1 does not require NMFS to specify a quota that will support a directed fishery if it is inappropriate to the stock condition. In fact, since 2008, the Council has recommended, and NMFS has specified, the butterflyfish quota at 500 mt to maintain butterflyfish landings at low levels due to concerns about the stock. In addition, courts have recognized that optimum yield is a level to be achieved on a continuing basis and not in a single year (see *North Carolina Fisheries Association v. Daley*). The commenters concluded that National Standard 2 is violated because the specifications were developed before the most recent NEFSC bottom trawl survey results were available. They believe that these survey results, which obtained more butterflyfish samples than in previous years, must be incorporated into the 2011 butterflyfish specifications. NMFS disagrees. National Standard 2 requires the use of the best available science at the point in time that an action is being developed. The Council's process for developing annual specifications for the butterflyfish fishery begins in June each year, and the Council utilized the best science available to it at that time to develop this action. If, in the future, new information indicates that the butterflyfish stock condition has changed, the Council can consider that information in the 2012 specifications process.

The results of the Autumn 2009, Spring 2010, and Autumn 2010 NEFSC surveys were not included in the data used for the SAW 49 stock assessment. NMFS notes that survey indices do not provide a point estimate of stock size or amount to a status determination. The calibration-adjusted butterflyfish catch rates from the Autumn 2009 and Autumn 2010 bottom trawl surveys were 6.4 kg/tow and 5.59 kg/tow, respectively. Though these numbers are about twice the average from Autumn surveys from 1999–2008 (3.4 kg/tow), it is not possible to determine if this

upturn constitutes a trend. NMFS notes that the butterflyfish stock assessment is not based solely on survey biomass indices, but incorporates data sets within a stock assessment model.

NMFS acknowledges that, if the cap is attained before the *Loligo* fishery has fully harvested the annual *Loligo* quota, there could be revenue losses for some *Loligo* harvesters. This possibility was discussed in the Council's Initial Regulatory Flexibility Analysis (IRFA), which assessed impacts of the proposed measures on small businesses. That analysis noted that, in 2009, the *Loligo* fishery ex-vessel value was approximately \$18 million. It is not possible to estimate when the *Loligo* fishery might reach the cap, because environmental conditions and fleet behavior are likely to strongly influence how much butterflyfish the *Loligo* fishery encounters. If high rates of butterflyfish catch occur, Amendment 10 estimated that up to 64 percent of 2006 *Loligo* revenue levels could be lost. The analysis noted that 2007–2009 landings were lower than in 2006, so a closure of the *Loligo* fishery would likely have a smaller impact, but concluded that a closure related to the butterflyfish mortality cap could substantially restrict *Loligo* landings. The economic impacts of the cap are further detailed in Amendment 10. NMFS notes that the preliminary data for *Loligo* in 2010 indicate that landings appear to have decreased from 9,306 mt in 2009 to approximately 6,714 mt in 2010. NMFS also notes that, during the debate over Amendment 10, some industry members often stated they could avoid butterflyfish voluntarily, and thus minimize interactions.

Comment 2: GSSA and Lund's both supported setting aside 3 percent of the mackerel IOY as RSA, but thought that the proposed rule should have included information about the 14 bilateral research priorities that emerged from the recent TRAC.

Response 2: NMFS solicited research proposals under the 2011 Mid-Atlantic RSA Program through the **Federal Register** (75 FR 3092, January 19, 2010), and reviewed them in an application process that is separate from the setting of annual specifications. The solicitation document is the appropriate vehicle to identify research priorities. The distribution of RSA quota to fund research depends both on Council specified research priorities and on the desire and capacity for the research community to compete for mackerel RSA. For the 2011 RSA Program, no proposals requesting mackerel RSA were approved, and thus no mackerel RSA will be allocated through this

action. The identification and development of joint U.S./Canada research priorities for mackerel is the subject of U.S./Canada Bilateral Fisheries Consultations and is not the subject of this rulemaking.

Comment 3: GSSA and Lund's expressed concern that the proposed mackerel specifications, which reflect the TRAC's recommendation that U.S. and Canadian catch not exceed 80,000 mt, are overly conservative and will unnecessarily reduce U.S. access to the mackerel resource. Both organizations are supportive of the proposed 2011 U.S. ABC of 47,395 mt as an interim quota, given the current uncertainty in stock status, and the method used to derive expected Canadian catch; however, they expressed concern that the Canadian mackerel quota for 2011 has been specified at 60,000 mt, a value higher than the Council expected. Lund's expressed concern that scientific uncertainty has recently led to dramatically reduced catch levels for otherwise apparently healthy resources like mackerel, which, until the 2010 assessment, was described as not overfished, with overfishing not occurring.

Both organizations supported the Agency's determination that both JVP and TALFF be set at zero because there is sufficient demand for mackerel in world markets to create opportunities for U.S. harvesters and shoreside processors to utilize all of the U.S. ABC.

Response 3: Although the TRAC was unable to establish reference points for stock biomass and fishing mortality, the assessment indicated reduced stock productivity and a lack of older fish in the survey and catch, and suggested limiting total catch of mackerel to 80,000 mt (average U.S./Canadian landings from 2006–2008) until new information suggests that a different amount is appropriate. The SSC's advice to the Council was consistent with this recommendation, and NMFS has determined that the approach reflected in the specifications is based on the best scientific information available.

The U.S. quota is derived from ABC by estimating Canadian catch in 2011 at 32,605 mt. NMFS acknowledges the commenters' concern that the Canadian Government has set the mackerel quota at 60,000 mt, but does not believe it is necessary to adjust the Canadian catch estimate in response. While the Canadian quota provides the opportunity for the Canadian fishery to increase landings substantially, NMFS believes that the Council's derivation method, which is based on recent fishery performance, provides the most reliable estimate of 2011 Canadian

catch. Despite the progress made in the recent joint assessment of the mackerel stock, there is no joint process for the allocation of the mackerel resource, and the United States and Canada set their catch levels for mackerel independently. NMFS notes that, despite the fact that the mackerel quota allocation for 2011 (46,779 mt) is lower than the 2010 allocation of 115,000 mt, it is still almost double the average U.S. mackerel landings of 25,000 mt during the past 3 years (2007–2009). NMFS notes that mackerel apparently continues to be unavailable to the U.S. fleet, as preliminary 2010 landings of mackerel are approximately 10,000 mt. As a result, the 2011 mackerel quota appears unlikely to constrain the fishery.

Comment 4: GSSA and Lund's both support the proposed specifications for *Illex* and *Loligo* squid.

Response 4: NMFS is implementing the proposed specifications through this final rule.

Classification

The Administrator, Northeast Region, NMFS, determined that these specifications are necessary for the conservation and management of the Atlantic mackerel, squid, and butterflyfish fisheries and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

The Assistant Administrator for Fisheries finds good cause under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness otherwise required by the Administrative Procedure Act. If there is a delay in implementing this action, NMFS will lack the regulatory authority to issue a closure for the *Loligo* fishery if the butterflyfish mortality cap is attained. The *Loligo* squid fishery is particularly active during the first Trimester of the fishing year. Given the timing of *Loligo* fleet activity, and history of fishery interactions between *Loligo* and butterflyfish, a delay in the effectiveness of this action is likely to result in a situation where the Trimester I butterflyfish mortality cap is exceeded. The regulations state that any overages of the butterflyfish mortality cap during Trimester I and II will be applied to Trimester III of the same year. If the 2011 mortality for Trimester I is exceeded prior to the effectiveness of this rule, this overage must be deducted from Trimester III, and the *Loligo* fishery would be closed even more prematurely during Trimester III. This outcome would severely limit the activity of *Loligo* fishermen who participate in the fishery during the latter portion of the year, which would negatively impact

these fishermen. The overall conservation objectives of the butterflyfish mortality cap will be undermined if the mortality cap is exceeded in Trimester I prior to the implementation of this action.

The Council prepared an EA for the 2011 specifications, and the NOAA Assistant Administrator for Fisheries concluded that there will be no significant impact on the human environment as a result of this rule. A copy of the EA is available upon request (see **ADDRESSES**).

This action is authorized by 50 CFR part 648 and has been determined to be not significant for purposes of Executive Order 12866 (E.O. 12866).

NMFS, pursuant to section 604 of the Regulatory Flexibility Act, has prepared a FRFA, included in the preamble of this final rule, in support of the 2011 MSB specifications and management measures. The FRFA describes the economic impact that this final rule, along with other non-preferred alternatives, will have on small entities.

The FRFA incorporates the economic impacts and analysis summarized in the IRFA, a summary of the significant issues raised by the public in response to the IRFA, and NMFS responses to those comments. A copy of the IRFA, the RIR, and the EA are available upon request (see **ADDRESSES**).

Statement of Need for This Action

This action proposes 2011 specifications and management measures for MSB fisheries and modifies existing management measures to improve the management of MSB fisheries. A complete description of the reasons why this action is being considered, and the objectives of and legal basis for this action, is contained in the preamble to the proposed and final rules and is not repeated here.

A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

Eight unique comment letters were received during the comment period on the proposed specifications. The comments were not specifically directed to the IRFA, but each of the comments expressed concern about negative economic impacts of the proposed ABCs for butterflyfish and mackerel, on small entities. All public comments on issues relative to the IRFA, in which commenters expressed concern directly and indirectly about the economic impacts of the 2011 specifications, are

described in the “Comments and Responses” section of the preamble to this final rule and, therefore, are not repeated here. NMFS’s response to the concerns about the economic impacts associated with the butterflyfish mortality cap for the *Loligo* fishery is provided in Response 1; and Response 3 addresses concerns about mackerel.

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

Based on permit data for 2010, the numbers of potential fishing vessels in the 2011 fisheries are as follows: 360 *Loligo*/butterfish moratorium permits, 76 *Illex* moratorium permits, 2,156 mackerel permits, 1,844 incidental squid/butterfish permits, and 1,844 MSB party/charter permits. There are no large entities participating in this fishery, as defined in section 601 of the RFA. Therefore, there are no disproportionate economic impacts on small entities. Many vessels participate in more than one of these fisheries; therefore, permit numbers are not additive.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action contains a change to an information collection previously approved by the Office of Management and Budget (OMB) under OMB Control Number 0648–0601: Atlantic Mackerel, Squid, and Butterfish Amendment 10 Data Collection. This action requires that vessels intending to embark on *Loligo* trips notify NEFOP at least 72 hr, but no more than 10 days before their intended departure dates. The adjustment will also allow vessels to submit an email address for contact. This change did not increase the reporting burden for these entities, and has been approved by OMB. This action does not duplicate, overlap, or conflict with any other Federal rules.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impacts on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

Actions Implemented With the Final Rule

The mackerel IOY specified in this action (46,779 mt, with 15,000 mt allocated to recreational catch) represents a reduction from status quo (115,000 mt). Despite the reduction, the specified IOY is above recent U.S. landings; mackerel landings for 2007–2009 averaged 23,310 mt; and preliminary landings in 2010 are approximately 10,000 mt. Thus, the reduction does not pose a constraint to vessels relative to the landings in recent years. Accordingly, no reductions in revenues for the mackerel fishery are expected as a result of this action.

The *Loligo* IOY (20,000 mt) represents a slight increase from the status quo (19,000 mt). *Loligo* landings for 2007–2009 averaged 11,019 mt. This provides an opportunity to increase landings, though if recent trends continue, there may be no increase in landings, despite the increase in the allocation. No reductions in revenues for the *Loligo* fishery are expected as a result of this action.

The accounting methods for *Loligo* trimester underages implemented in this action will distribute any substantial underage in Trimester I (greater than 25 percent of the Trimester I quota) between Trimester II and III, but will limit the transfer of quota such that the Trimester II quota could increase by 50 percent, at most. This method of transferring quota may provide some economic benefit to the fishery during Trimesters II and III, because it will allow access to underutilized Trimester I quota later in the fishing year.

The change to the pre-trip observer notification requirement implemented in this action, which would allow vessels to notify at least 72 hr, but no more than 10 days prior to fishing trips, is an administrative measure to facilitate the placement of observers aboard the *Loligo* fleet, and is intended to reduce the burden of the notification requirement for vessels that depart on multiple trips in a short period by allowing for advance notification. The economic burden on fishery participants

associated with this measure is expected to be minimal.

The *Illex* IOY (23,328 mt) specified in this action represents a slight decrease compared to status quo (24,000 mt). Though annual *Illex* landings have been increasing over the past 3 years (9,002 mt for 2007, 15,900 mt for 2008, and 18,419 mt for 2009), the landings were lower than the specified level. Thus, implementation of this action should not result in a reduction in revenue or a constraint on expansion of the fishery in 2011.

The butterflyfish IOY specified in this action (500 mt) represents status quo, as compared to 2010, and represents only a minimal constraint to vessels relative to the landings in recent years. Due to market conditions, there has not been a directed butterflyfish fishery in recent years; therefore, recent landings have been low. Given the lack of a directed butterflyfish fishery and low butterflyfish landings, this action is not expected to reduce revenues in this fishery more than minimally.

As discussed in the FRFA for MSB Amendment 10, the butterflyfish mortality cap has a potential for economic impact on fishery participants. The *Loligo* fishery will close during Trimesters I and III, if the butterflyfish mortality cap is reached. If the *Loligo* fishery is closed in response to butterflyfish catch before the entire *Loligo* quota is harvested, then a loss in revenue is possible. The potential for *Loligo* revenue loss is dependent upon the size of the butterflyfish mortality cap, which is based on the level of butterflyfish abundance. As the butterflyfish stock rebuilds, the mortality cap will increase, and the potential for lost *Loligo* revenue should decrease. When the butterflyfish stock rebuilds, a directed butterflyfish fishery could resume, provided discards are kept low, and would have economic benefits for fishery participants.

Alternatives to the Actions in the Final Rule

The Council analysis evaluated two alternatives to this action for mackerel. Based on recent harvest levels, neither of the ABC and IOY alternatives would represent a constraint on vessels in this fishery. The first alternative (status quo; least restrictive), which would have set the ABC at 156,000 mt and IOY at 115,000 mt, was not selected because the ABC would have exceeded the SSC’s recommendation.

As in the selected action (intermediately restrictive), the second alternative (most restrictive) started from the SSC recommended stockwide ABC of 80,000 mt, but instead subtracted an estimated 41,556 mt for

Canadian landings. This would have resulted in a U.S. ABC of 38,444 mt, and an IOY and DAH of 37,944 mt (U.S. ABC minus 1.3 percent for discards). For this alternative, expected Canadian catch (41,556 mt) was derived by examining the relationship between Canadian landings in one year (e.g., 1994) and the Canadian landings 2 years later (e.g., 1996); this analysis was chosen so that 2009 Canadian landings could be used to determine expected Canadian landings for 2011. The years examined included 1962–2009. Though the two landings series were found to be strongly correlated (correlation coefficient = 0.71), this method of deriving expected Canadian catch (and the resulting specifications alternative) was not determined to be the best approach. The landings series compared in the method used to derive 2011 Canadian catch in the selected alternative (U.S. landings in one year and Canadian landings in the next year) were found to have a stronger correlation (correlation coefficient = 0.86) than the landings series compared in this alternative. Thus, using the Canadian catch derivation method in the selected alternative provides a more reliable estimate of 2011 Canadian catch.

There were two alternatives to the selected action evaluated for *Loligo*. Both alternatives set the Max OY at 32,000 mt, the same level as the selected action. The first alternative (status quo) would have set the ABC and IOY at 19,000 mt; this alternative was not chosen, because it was not consistent with the ABC recommended by the SSC. The second alternative (least restrictive) would have set the ABC at the level recommended by the SSC (24,000 mt), but would have set the IOY at 22,560 mt (ABC reduced by 6 percent to account for discards). This alternative was not adopted by the Council because two sources of uncertainty, namely the uncertainty regarding the discard estimate and the management uncertainty regarding the operation of the *Loligo* fishery in 2011, given the impending implementation of the butterflyfish mortality cap, warranted setting the IOY at the more precautionary level specified in this action (intermediately restrictive).

The alternatives also differed in how Trimester I underages and overages would be applied to the *Loligo* quotas in the following Trimesters. The first alternative (status quo) would maintain the current measure to distribute an underage in Trimester I greater than 25 percent of the Trimester I quota evenly between Trimesters II and III. The current measure was not considered to

be sufficient to address management uncertainty related to the implementation of the butterflyfish mortality cap in 2011.

Two non-selected alternatives were considered for *Illex*; both would have set the ABC at 24,000 mt. The first alternative would have set IOY, DAH, and DAP at 24,000 mt (status quo; least restrictive) rather than the 23,328 mt specified in this action (intermediately restrictive). This alternative was not selected because the higher specifications were inconsistent with the results of the most recent stock assessment. The second alternative (most restrictive) would have set IOY, DAH, and DAP at 22,656 mt (ABC reduced by 5.6 percent, based on double the discard ratio estimate). The Council considered this alternative unnecessarily restrictive.

One non-selected alternative was considered for butterflyfish that would maintain the status quo, which only differs from the selected alternative in that it would have set Max OY at 12,175 mt. The selected alternative removes the specification of Max OY, because it is no longer supported by best available science. All other specifications are identical to the status quo alternative.

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 letter to permit holders that also serves as small entity compliance guide was prepared. The guide will be sent to all holders of permits issued for the MSB fisheries. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from the Regional Administrator and are also available from NMFS, Northeast Region (see ADDRESSES).

This action contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA), which was previously approved by OMB under OMB Control Number 0648–0601. The public reporting burden for the phone call to declare a *Loligo* fishing trip is estimated to average 2 min per call per trip. Public burden for the phone call to cancel a *Loligo* trip is estimated to average 1 min. Send comments regarding these burden estimates or any

other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and by e-mail to OIRA_Submission@omb.eop.gov, or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: February 8, 2011.

Samuel D. Rauch III,

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 § 648.21, paragraph (f)(2) is revised to read as follows:

§ 648.21 Procedures for determining initial annual amounts.

* * * * *

(f) * * *

(2) Any underages of commercial period quota for Trimester I that are greater than 25 percent of the Trimester I quota will be reallocated to Trimesters II and III of the same year. The reallocation of quota from Trimester I to Trimester II is limited, such that the Trimester II quota may only be increased by 50 percent; the remaining portion of the underage will be reallocated to Trimester III. Any underages of commercial period quota for Trimester I that are less than 25 percent of the Trimester I quota will be applied to Trimester III of the same year. Any overages of commercial quota for Trimesters I and II will be subtracted from Trimester III of the same year.

* * * * *

■ 3. In § 648.22, paragraph (a)(2)(i) is revised to read as follows:

§ 648.22 Closure of the fishery.

(a) * * *

(2) * * *

(i) If the Regional Administrator determines that the Trimester I closure threshold has been underharvested by

25 percent or more, then the amount of the underharvest shall be reallocated to Trimesters II and III, as specified at § 648.21(f)(2), through notice in the **Federal Register**.

* * * * *

■ 4. Section 648.26 is amended by revising paragraphs (a) and (d) to read as follows:

§ 648.26 Observer requirements for the Loligo fishery.

(a) A vessel issued a *Loligo* and butterfish moratorium permit, as specified at § 648.4(a)(5)(i), must, for the purposes of observer deployment, have a representative provide notice to NMFS of the vessel name, vessel permit

number, contact name for coordination of observer deployment, telephone number or e-mail address for contact; and the date, time, port of departure, and approximate trip duration, at least 72 hr, but no more than 10 days prior to beginning any fishing trip, unless it complies with the possession restrictions in paragraph (c) of this section.

* * * * *

(d) If a vessel issued a *Loligo* and butterfish moratorium permit, as specified at § 648.4(a)(5)(i), intends to possess, harvest, or land 2,500 lb (1.13 mt) or more of *Loligo* per trip or per calendar day, has a representative notify

NMFS of an upcoming trip, is selected by NMFS to carry an observer, and then cancels that trip, then the representative is required to provide notice to NMFS of the vessel name, vessel permit number, contact name for coordination of observer deployment, and telephone number or e-mail for contact, and the intended date, time, and port of departure for the cancelled trip prior to the planned departure time. In addition, if a trip selected for observer coverage is canceled, then that vessel is required to carry an observer, provided an observer is available, on its next trip.

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