

can be directed to Amy Nelson at 202-493-0591.

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**Alan K. Mayberry,**

*Deputy Associate Administrator for Field Operations.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 110218142-1276-02]

RIN 0648-BA91

#### Fisheries of the Northeastern United States; Northeast Skate Complex Fishery; Framework Adjustment 1

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

**ACTION:** Final rule.

**SUMMARY:** This final rule implements approved measures in Framework Adjustment 1 to the Northeast Skate Complex Fishery Management Plan (Skate FMP). Framework Adjustment 1 was developed by the New England Fishery Management Council (Council) to adjust the possession limits for the skate wing fishery in order to slow the rate of skate wing landings, so that the available Total Allowable Landings limit (TAL) is taken by the fishery over a longer duration in the fishing year (FY) than occurred in FY 2010, thus ensuring a steady market supply. The action would also allow vessels that process skate wings at sea to land skate carcasses for sale into the bait market, without counting the carcass landings against the TAL (skate wings are already converted to live weight for monitoring). Although recommended by the Council as part of Framework 1, this final rule announces that NMFS has disapproved a proposal to increase the incidental possession limit for skate wings that would apply after the skate wing possession limit trigger is reached. This final rule does not adjust the skate fishery specifications for FY 2011.

**DATES:** Effective May 17, 2011.

**ADDRESSES:** An environmental assessment (EA) was prepared for Framework Adjustment 1 that describes the proposed action and other considered alternatives, and provides a thorough analysis of the impacts of the

proposed measures and alternatives. Copies of Framework 1, the EA, and the Initial Regulatory Flexibility Analysis (IRFA) are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council (Council), 50 Water Street, Newburyport, MA 01950. These documents are also available online at <http://www.nefmc.org>.

**FOR FURTHER INFORMATION CONTACT:** Tobey Curtis, Fishery Policy Analyst, (978) 281-9273; fax: (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

In 2003, NMFS implemented the Skate FMP to manage a complex of seven skate species in the Northeast Region: Winter (*Leucoraja ocellata*); little (*L. erinacea*); thorny (*Amblyraja radiata*); barndoor (*Dipturus laevis*); smooth (*Malacoraja senta*); clearnose (*Raja eglanteria*); and rosette (*L. garmani*) (68 FR 49693, August 19, 2003). The FMP established biological reference points and overfishing definitions for each species based on abundance indices in the NMFS Northeast Fisheries Science Center bottom trawl survey.

Amendment 3 to the Skate FMP, which was implemented in July 2010, instituted an annual catch limit (ACL) and accountability measures (AMs) for the skate fishery (75 FR 34049, June 16, 2010). To ensure that the ACL is not exceeded, regulations implementing Amendment 3 established a possession limit of 5,000 lb (2,268 kg) of skate wings (11,350 lb (5,148 kg) whole weight) per trip for the skate wing fishery, and an AM that further reduces the wing fishery possession limit to an incidental level of 500 lb (227 kg) of skate wings (1,135 lb (515 kg) whole weight) when 80 percent of the TAL for the wing fishery is reached. In FY 2010, the combination of increased landings of skate wings and a delay in implementation of the 5,000-lb (2,268-kg) skate wing possession limit resulted in the fishery reaching the 80-percent TAL trigger in early September. Consequently, the skate wing fishery was limited to the incidental possession limit of 500 lb (227 kg) of skate wings per trip from September 3, 2010, through the end of FY 2010 on April 30, 2011.

Asserting that the imposition of the 500-lb (227-kg) skate wing possession limit so early in the FY caused disruptions in the supply of skate wings, economic hardship on fishing vessels and dealers, and threatened to undermine the market position of U.S. suppliers, members of the skate wing

fishing industry requested that the Council consider options to mitigate the potential for this situation to be repeated in FY 2011. In November 2010, the Council initiated Framework 1 to change the skate wing possession limits in order to maximize the duration of the skate fishing season in FY 2011. In January 2011, the Council approved Framework 1 and recommended that NMFS implement new possession limits for the skate wing fishery. On April 4, 2011, NMFS published a proposed rule (76 FR 18505) identifying the proposed measures in Framework 1 and informing the public of its intention to disapprove one measure recommended by the Council. Comments on the proposed rule were accepted through April 19, 2011.

#### Approved Measures

NMFS has approved the following changes to the regulations governing the skate fishery as proposed by the Council in Framework 1:

1. The skate wing fishery possession limit is changed from 5,000 lb (2,268 kg) of skate wings per trip to 2,600 lb (1,179 kg) per trip from May 1 through August 31, and 4,100 lb (1,860 kg) per trip from September 1 through April 30;
2. The skate wing fishery incidental possession limit trigger is changed from 80 percent of the skate wing TAL to 85 percent of the skate wing TAL; and
3. The regulations governing the allowable forms of skates that may be possessed and landed is changed to allow the landing of skate carcasses separate from skate wings.

The rationale for the Council's proposed measures in Framework 1 was provided in the preamble to the proposed rule for this action and is not repeated here. Regarding the change to the allowable forms of skates that may be possessed and landed, skates may now be possessed or landed either as wings only, wings with associated carcasses possessed separately, in whole form, or any combination of the three, provided that the weight of skate carcasses does not exceed 1.27 times the weight of skate wings on board. This ratio, based upon established wing-to-whole weight conversion factor for skates, is intended to assure that the only carcasses possessed and landed correspond to skates that have had their wings removed and are retained by the vessel for sale. When any combination of wings, carcasses, and whole skates are possessed, the possession limit is based on the equivalent whole weight limit where wing weight is converted to whole weight using the wing to whole weight conversion factor of 2.27. For example, a vessel possessing 100 lb

(45.4 kg) of skate wings would be considered to possess the equivalent of 227 lb (103.1 kg) of whole skates (100 lb  $\times$  2.27 = 227 lb (103.1 kg)). If that vessels possessed both wings and carcasses, it could have 100 lb (45.4 kg) of skate wings and 127 lb (57.6 kg) of carcasses (100 lb skate wings  $\times$  1.27 = 127 lb (57.6 kg)). Note that the sum of the two products must not exceed the applicable whole weight possession limit. This action is not intended to allow the landing of skate carcasses without the associated skate wings.

#### Disapproved Measure

NMFS has disapproved a measure proposed by the Council in Framework 1 to increase the skate wing fishery incidental possession limit (the limit that applies to all landings of skate wings once landings reach the appropriate TAL trigger percentage) from 500 lb (227 kg) of skate wings per trip to 1,250 lb (567 kg) per trip. NMFS has disapproved this measure because it is inconsistent with National Standard 2, which requires the use of the best available scientific information for ensuring compliance with the objectives of Amendment 3 to the Skate FMP (which established management measures designed to prevent the TAL from being exceeded) and of this framework action (which is designed to lengthen the duration of the directed skate wing fishing season). Therefore, the skate wing incidental possession limit remains at 500 lb (227 kg) of skate wings per trip. Disapproving the change in the incidental limit does not affect the other measures in this action. For a fuller explanation of the rationale for disapproving this proposed measure, see the Comments and Responses section below.

#### Comments and Responses

NMFS received seven comments on the proposed rule: One letter from the Council; three letters on behalf of commercial fishing associations; and three letters from individual commercial fishermen. This section summarizes the principle comments contained in the individual comment letters that pertained to Framework 1 and the proposed rule, and NMFS's response to those comments.

*Comment 1:* One letter expressed frustration that the skate TAL will not increase this year.

*Response:* Although recent survey data show promising increases in survey catch for some of the species in the skate complex, not all species are doing well. Skates are managed as a complex, and because the specifications (ABC, ACL, TAL) are set for the overall

complex rather than for particular species, increases in survey catches for one or two species do not necessarily immediately translate into allowable increases in the specifications for the complex as a whole. The recent survey data are being considered by the Council as it begins the process to develop and recommend specifications for the 2012–2013 FYs.

*Comment 2:* Another letter raised concerns regarding the impacts Framework 1 may have on non-federally permitted fishermen fishing in Rhode Island state waters.

*Response:* This action makes no changes to the regulations governing fishermen without Federal permits fishing only in state waters. Any future changes to such regulations made by a state, such as Rhode Island, are beyond the purview of NMFS's control and this action.

*Comment 3:* The remaining five letters, including that of the Council, all expressed the same concern regarding NMFS's stated intent to disapprove the proposed change to the incidental possession limit and requested that we reconsider this decision. The commenters acknowledge that the higher incidental possession limit, in conjunction with the increased TAL trigger, could result in an overage of the TAL, but suggest that this should not be a concern because there may be an increase in the ABC later this year that results from current work being done by the Council's Plan Development Team (PDT) and Scientific and Statistical Committee (SSC).

*Response:* The changes implemented under Framework 1 must remain consistent with the current best available science, and any future actions to change the ABC based on new advice from the Council's SSC would be the appropriate vehicle to consider modifying the associated management measures, such as the possession limits, to be consistent with such a revised ABC. The Council's recommendation to change the trigger point at which the incidental possession limit is imposed is also an attempt to lengthen the duration of the directed skate wing fishery. However, based on the analysis prepared by the Council's Skate PDT and presented to the Council at its January 2011 meeting, the combination of a 1,250-lb (567-kg) incidental possession limit and an 85-percent trigger point would be expected to result in landings exceeding the skate wing TAL by more than 7 percent.

Amendment 3 to the Skate FMP established the TAL as the limit for skate landings, taking into account the needs of the skate wing and bait

fisheries (i.e., allocating the overall skate TAL to the skate wing and bait fisheries according to specific percentages), discards of skates in all fisheries that encounter skates, and the biological status of the resource. The management measures implemented in Amendment 3 were designed to constrain overall skate landings to the TAL, and, in situations in which a TAL is exceeded, the Amendment 3 regulations require automatic adjustments to the TAL trigger threshold (on a point-for-point basis). If the wing TAL were to be exceeded by 7 percent, as the Council's analysis indicates is likely, then the Amendment 3 regulations would require the TAL trigger for the following FY to be reduced from 85 percent of the TAL to 78 percent of the TAL, forcing an even earlier transition to the incidental possession limit. This result would be inconsistent with the intent of Framework 1 (implementing measures to extend the length of the directed skate wing fishery) and the objectives of Amendment 3 (implementing measures to constrain landings to within the available TAL) to alter both the incidental skate wing possession limit and the TAL trigger point, as proposed by the Council; the measure to increase the TAL trigger from 80 percent to 85 percent would likely be undone due to a 7-percent overage that would require the trigger point to be reduced to 78 percent in the following FY. This would be counter-productive to the Council's stated intent of increasing the TAL trigger point in the first place, which is to lengthen the duration of the directed fishing season. Even under the current 500-lb (227-kg) incidental limit, catch continued to be high, and in FY 2010 the fishery likely exceeded the wing TAL by 6–7 percent. The Council's analysis suggests that the trigger point can be increased to 85 percent of the TAL if the incidental wing limit is maintained at the current 500-lb (227-kg) level, while still remaining within the TAL. Thus, NMFS has disapproved the proposed increase to the incidental skate wing possession limit because it would be inconsistent with National Standard 2 requiring the use of the best available scientific information for ensuring compliance with the objectives of Amendment 3 to the Skate FMP (which established management measures designed to prevent the TAL from being exceeded) and of this framework action (which is designed to lengthen the duration of the directed skate wing fishing season). Accordingly, the incidental skate wing possession

limit at § 648.322(b)(2) remains at 500 lb (227 kg).

### Changes From the Proposed Rule

In § 648.322(b)(2), the proposed change to the incidental skate wing possession limit is not included in this final rule due to the disapproval of this proposed measure.

### Classification

The Administrator, Northeast Region, NMFS, determined that Framework 1 is necessary for the conservation and management of the skate fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

The Office of Management and Budget has determined that this proposed rule is not significant for the purposes of Executive Order 12866.

Under the Administrative Procedure Act, an agency may waive the 30-day delay in the effectiveness of a final rule following publication where the rule relieves a restriction, is an interpretive rule or statement of policy, or for other good cause found by the agency. 5 U.S.C. § 553(d). Pursuant to this provision, NMFS finds good cause to waive the delay in effectiveness requirement because such delay is contrary to the public interest and unnecessary.

The purpose of this rule is to slow the rate of skate wing landings and thereby preserve and extend the skate wing harvest throughout the whole fishing year. Delaying this rule's effectiveness would risk shortening the skate wing harvest, and is therefore contrary to the public's interest in maintaining the harvest throughout the fishing year. Additionally, a delay in the rule's effectiveness is unnecessary because the rule imposes no new requirements on the regulated community, and instead expands the scope of acceptable fishing practices in the skate wing fishery. Thus, even if the rule is effective immediately, the regulated entities can continue their current practices and remain in compliance with the new regulations. Moreover, delaying the effectiveness of this rule may result in economic harm to vessels that must currently land their skates either in whole form, and process the fish into wings and carcasses for separate markets upon landing, or must discard the carcasses at sea, practices that increase waste and reduce the economic yield from the skate resource. Because the 30-day delay in effectiveness of this rule is contrary to the public interest and unnecessary, pursuant to 5 U.S.C. § 553(d), the Assistant Administrator

finds good cause to waive the 30-day delay in effective date.

Pursuant to section 604 of the Regulatory Flexibility Act (RFA), NMFS has prepared a Final Regulatory Flexibility Analysis (FRFA) in support of Framework 1. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, relevant analyses contained in the Framework and its EA and a summary of the analyses completed to support the action in this rule. A copy of the analyses done in the Framework and EA is available from the Council (see **ADDRESSES**). A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in the preamble to the proposed rule and this final rule and is not repeated here.

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

Seven comments were received on the proposed rule and the framework. For a summary of the comments, and NMFS's responses to them, see the Comments and Responses section above. No changes were made to the rule as a result of the comments.

### Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The participants in the commercial skate fishery were defined using Northeast dealer reports to identify any vessel that reported having landed 1 lb (0.45 kg) or more of skates during calendar year 2010. These dealer reports identified 690 vessels that landed skates for the skate wing market in states from Maine to North Carolina out of 2,607 vessels that held a Federal skate permit. Of the 690 vessels that landed at least 1 lb (0.45 kg) of skates for the wing market, 592 vessels landed at least some amount of skates in wing form, and these vessels would be affected by the proposed change to allow vessels landing skate wings to also land the associated carcasses for sale as bait. All of these entities are considered small businesses by the Small Business Administration because they have annual receipts not totaling more than \$4 million.

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

This action does not introduce any new reporting, recordkeeping, or other compliance requirements. This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

### Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

The purpose of Framework 1 is to adjust the possession limits affecting the skate wing fishery in order to extend the duration of the fishing season during which the fishery could land skate wings at "directed" levels (*i.e.*, before the possession limits are reduced to incidental landings levels), while constraining the overall skate wing landings to remain within the TAL. To achieve these ends, the Council considered several alternatives for each of three principal management measures: (1) The primary possession limit affecting the directed skate wing fishery; (2) the trigger point (as a percentage of the TAL) at which the primary possession limit is reduced to a lower, incidental level of allowable landings; and (3) the possession limit that would be imposed once the possession limit trigger is reached.

In approving several measures proposed in Framework 1, NMFS had to weigh the potential short-term economic impacts to individual fishermen of a reduced skate wing possession limit during May–August, when demand and price are generally lower (average of \$0.33/lb during 2009 and 2010), versus the longer-term benefits to the fishery as a whole of preserving more of the available TAL for the fall and winter months when demand and price are generally higher (average of \$0.64/lb during 2009 and 2010) and allowing higher levels of landings during this time. Implementation of this final rule is expected, on balance, to maximize fishing opportunities for skates throughout the FY and improve the profitability of the fishery. The other alternatives considered by the Council in the development of Framework 1 did not provide the same level of opportunity to preserve the available TAL for the fall and winter months and to then take advantage of the higher demand and prices by increasing the possession limit at that time. Therefore, through the implementation of the change to the skate wing possession limit, NMFS intends to minimize the

economic impacts to affected small entities to the extent practicable and consistent with applicable law.

The change to the possession limit trigger point (from 80 percent of the TAL to 85 percent), is also expected to increase the duration of the directed fishing season, similarly improving the economic performance and profitability of the fishery. All other alternatives developed and considered by the Council for Framework 1 would have resulted in a shorter fishing season by imposing the more restrictive incidental possession limit at a lower trigger point. Therefore, through the implementation of the change to the possession limit trigger point, NMFS intends to minimize economic impact to affected small entities to the extent practicable and consistent with applicable law.

The Council also proposed a change to the skate wing possession limit that would be imposed once the trigger point was reached. On its face, this appeared that it would have further increased the profitability of the skate fishery, by allowing higher landings on each fishing trip for the remainder of the FY. However, as the Council's own analysis indicated, such a change—in combination with the other proposed changes to the possession limit and the trigger point—would likely have ensured the fishery exceeds skate wing TAL by approximately 7 percent. Because this result would require implementation of an AM that would have reversed the change to the possession limit trigger point, effectively shortening the fishing season in the following year, NMFS considers this proposed measure to be counter-productive and inconsistent with the Council's stated intent for Framework 1. Therefore, even though a higher incidental possession limit may have minimized short-term negative economic impacts to the affected fishing industry, NMFS has disapproved this measure to ensure that the TAL is not exceeded, and that such an AM is less likely to be required in future years.

In addition to the primary alternatives considered in this action, the Council considered a change in the regulations to allow skate carcasses to be landed rather than discarded at sea. This proposed measure is expected to have no effect on the overall mortality of skates caught, but could result in marginal increases in per trip fishing revenue for vessels that cut skate wings at sea and land the remaining carcasses for sale as lobster bait (estimates range from approximately \$360 per trip at the 2,600-lb (1,179-kg) possession limit to approximately \$570 per trip at the 4,100-lb (1,860-kg) possession limit).

Because the only significant alternative considered in this case is the status quo, under which the landing of skate carcasses would continue to be prohibited, the Council's proposed action in this case maximizes the potential revenue available to the fishing industry.

#### 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 (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office, and the guide, *i.e.*, permit holder letter, will be sent to all holders of permits for the skate fishery. The guide and this final rule will be available upon request, and posted on the Northeast Regional Office's Web site at <http://www.nero.noaa.gov>.

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

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: May 12, 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 § 648.322, revise paragraph (b) to read as follows:

#### § 648.322 Skate allocation, possession, and landing provisions.

\* \* \* \* \*

(b) *Skate wing possession and landing limits.* A vessel or operator of a vessel that has been issued a valid Federal skate permit under this part, provided the vessel fishes under an Atlantic sea scallop, NE multispecies, or monkfish DAS as specified at §§ 648.53, 648.82, and 648.92, respectively, or is also a limited access multispecies vessel

participating in an approved sector described under § 648.87, unless otherwise exempted under § 648.80 or paragraph (c) of this section, may fish for, possess, and/or land up to the allowable trip limits of skate wings (with appropriate whole weight equivalents) specified as follows:

(1) Up to 2,600 lb (1,179 kg) of skate wings (5,902 lb (2,677 kg) whole weight) per trip from May 1 through August 31, and 4,100 lb (1,860 kg) of skate wings (9,307 lb (4,222 kg) whole weight) per trip from September 1 through April 30, except for a vessel fishing on a declared NE multispecies Category B DAS described under § 648.85(b), which is limited to no more than 220 lb (100 kg) of skate wings (500 lb (227 kg) whole weight) per trip (or any prorated combination of skate wings and whole skates based on the conversion factor for wing weight to whole weight of 2.27—for example, 100 lb (45.4 kg) of skate wings  $\times$  2.27 = 227 lb (103.1 kg) of whole skates).

(2) *In-season adjustment of skate wing possession limits.* When the Regional Administrator projects that 85 percent of the annual skate wing fishery TAL has been landed, the Regional Administrator shall, through a notice in the **Federal Register** consistent with the Administrative Procedure Act, reduce the skate wing trip limit to 500 lb (227 kg) of skate wings (1,135 lb (515 kg) whole weight, or any prorated combination of skate wings and whole skates based on the conversion factor for wing weight to whole weight of 2.27) for the remainder of the fishing year, unless such a reduction would be expected to prevent attainment of the annual TAL.

(3) *Incidental possession limit for vessels not under a DAS.* A vessel issued a Federal skate permit that is not fishing under an Atlantic sea scallop, NE multispecies, or monkfish DAS as specified at §§ 648.53, 648.82, and 648.92, respectively, or is a limited access multispecies vessel participating in an approved sector described under § 648.87 but not fishing on one of the DAS specified at §§ 648.53, 648.82, or 648.92, may retain up to 500 lb (227 kg) of skate wings or 1,135 lb (515 kg) of whole skate, or any prorated combination of skate wings and whole skates based on the conversion factor for wing weight to whole weight of 2.27, per trip.

(4) *Allowable forms of skate landings.* Except for vessels fishing under a skate bait letter of authorization as specified at § 648.322(c), a vessel may possess and/or land skates as wings only (wings removed from the body of the skate and the remaining carcass discarded), wings with associated carcasses possessed

separately (wings removed from the body of the skate but the associated carcass retained on board the vessel), or in whole (intact) form, or any combination of the three, provided that the weight of the skate carcasses on board the vessel does not exceed 1.27 times the weight of skate wings on board. When any combination of skate wings, carcasses, and whole skates are

possessed and/or landed, the applicable possession or landing limit shall be based on the whole weight limit, in which any wings are converted to whole weight using the wing to whole weight conversion factor of 2.27. For example, if the vessel possesses 100 lb (45.4 kg) of skate wings, the whole weight equivalent would be 227 lb (103.0 kg) of whole skates (100 lb (45.4 kg) × 2.27),

and the vessel could possess up to 127 lb (57.6 kg) of skate carcasses (100 lb (45.4 kg) of skate wings × 1.27). A vessel may not possess and/or land skate carcasses and only whole skates.

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