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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0808041037-1649-02]

RIN 0648-AX05

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 11

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

ACTION: Final rule.

SUMMARY: NMFS is implementing approved measures in Amendment 11 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan, developed by the Mid-Atlantic Fishery Management Council. The approved measures include: A tiered limited access program for the Atlantic mackerel fishery; an open access incidental catch permit for mackerel; an update to essential fish habitat designations for all life stages of mackerel, longfin squid, Illex squid, and butterfish; and the establishment of a recreational allocation for mackerel.

DATES: Effective [insert date 30 days after date of publication in the FEDERAL REGISTER], except for the amendment to § 648.4, which is effective March 1, 2012.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Final Environmental Impact Statement (FEIS) 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 FEIS/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 the preamble of this final rule. Copies of the FRFA, Record of Decision (ROD), and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, 55 Great Republic Drive, Gloucester, MA 01930, and are also available 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](mailto:OIRA_Submission@omb.eop.gov), or fax to 202-395-7285.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

This final rule implements the measures in Amendment 11, which was approved on behalf of the Secretary of Commerce (Secretary) on September 30, 2011. A proposed rule was published in the Federal Register on August 1, 2011 (76 FR 45742), with comments accepted through September 15, 2011. The details of the development of Amendment 11 were contained in the preamble of the proposed rule and are not repeated here.

##### Approved Measures

Changes in the descriptions of the management measures from the proposed rule's descriptions are noted below. Changes in the regulatory text from the proposed rule are noted

under “Changes from Proposed Rule to Final Rule” in the preamble of this final rule.

As noted in the proposed rule, some of the regulations implemented through Amendment 11 are associated with the Council’s Omnibus Annual Catch Limit and Accountability Measures (Omnibus) Amendment, which was approved by the Secretary on August 12, 2011, and published as a final rule on September 29, 2011 (76 FR 60606). Several sections of regulatory text are affected by both actions. Since the Omnibus Amendment and its regulatory text are now finalized, the regulatory text presented in this final rule references the updated regulations. Therefore, it differs slightly in structure, but not content, from the regulations presented in the proposed rule.

#### 1. Limited Access Mackerel Permits and Trip Limits

Amendment 11 implements a three-tiered limited access permit system for the mackerel fishery. Vessels that do not qualify for a limited access mackerel permit are eligible to receive the open access mackerel permit described below. Initial trip limits established for each permit category can be adjusted through the specifications process.

In order to be eligible for a limited access mackerel permit, applicants must meet both a permit history requirement and a landings requirement. The preamble of the proposed rule noted that the permit history requirement and landings requirement must be derived from the same vessel (i.e., it is not possible to combine the permit criteria from Vessel A with the landings criteria from Vessel B to create a mackerel eligibility). This statement is inconsistent with the regulatory text in the proposed rule. NMFS clarifies that permit and landings requirement must be derived from the same vessel unless they are combined through vessel replacement prior to March 21, 2007.

## Permit Requirement

To meet the permit requirement, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, or must be replacing a vessel that was issued a Federal mackerel permit that was valid on March 21, 2007. If the vessel sunk, was destroyed, or transferred prior to March 21, 2007, and a mackerel permit was not issued to a replacement vessel as of March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007.

## Landings Requirement

NMFS will use dealer data in its database to determine eligibility. If NMFS' data do not demonstrate that a vessel made landings of mackerel that satisfy the eligibility criteria for a limited access permit, applicants must submit dealer receipts that verify landings, or use other sources of information (e.g., joint venture receipts) to demonstrate that there is incorrect or missing information in the Federal dealer records via the appeals process described below.

Vessels that fished cooperatively for mackerel in pair trawl operations may divide the catch history between the two vessels in the pair through third-party verification and supplemental information, such as previously submitted vessel trip reports (VTRs), or dealer reporting. The two owners must apply for a limited access mackerel permit jointly and must submit proof that they have agreed to the division of landings. This approach was used to qualify pair trawl vessels in Amendment 1 to the Atlantic Herring Fishery Management Plan (FMP).

To qualify for a Tier 1 Limited Access Mackerel permit, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, and must have landed at least

400,000 lb (181.44 mt) of mackerel in any one year between January 1, 1997, and December 31, 2005, as verified by NMFS records or documented through dealer receipts submitted by the applicant. The Tier 1 Limited Access Mackerel permit allows vessels to possess and land unlimited amounts of mackerel while the mackerel fishery is open to directed fishing.

To qualify for a Tier 2 Limited Access Mackerel permit, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, and must have landed at least 100,000 lb (45.36 mt) of mackerel in any one year between March 1, 1994, and December 31, 2005, as verified by NMFS records or documented through dealer receipts submitted by the applicant. The Tier 2 Limited Access Mackerel permit allows vessels to possess and land 135,000 lb (61.23 mt) of mackerel per trip while the mackerel fishery is open to directed fishing.

To qualify for a Tier 3 Limited Access Mackerel permit, a vessel must have been issued a Federal mackerel permit that was valid on March 21, 2007, and must have landed at least 1,000 lb (0.45 mt) of mackerel in any one year between March 1, 1994, and December 31, 2005, as verified by NMFS records or documented through dealer receipts submitted by the applicant. The Tier 3 Limited Access Mackerel permit allows vessels to possess and land 100,000 lb (45.36 mt) of mackerel per trip while the mackerel fishery is open for directed fishing, or while the Tier 3 allocation is still available.

The current regulations state that, during a closure of the directed mackerel fishery that occurs prior to June 1, vessels issued a mackerel permit may not fish for, possess, or land more than 20,000 lb (9.08 mt) of mackerel per trip, and that, during any closure that occurs after June 1, vessels may not fish for, possess, or land more than 50,000 lb (22.7 mt) of mackerel per trip. While the preamble to the proposed rule stated that this provision would be maintained as is, the

regulatory text stated that the closure possession limit would be 20,000 lb (9.08 mt), regardless of when a closure occurs during the fishing year. NMFS clarifies in this final rule that the closure possession limit presented in the regulatory text is consistent with the intent of Amendment 11; thus, the closure possession limit for mackerel will be 20,000 lb (9.08 mt).

## 2. Limited Access Vessel Permit Provisions

Amendment 11 establishes measures to govern future transactions related to limited access vessels, such as purchases, sales, or reconstruction. These measures apply to all limited access mackerel vessels. Except as noted, the provisions in this amendment are consistent with those that govern most of the other Northeast region limited access fisheries; there are some differences in the limited access program for American lobster.

### Initial Eligibility and Application

Initial eligibility for a mackerel limited access permit must be established during the first year after the implementation of Amendment 11. A vessel owner is required to submit an application for a mackerel limited access permit within 12 months of the effective date of the final regulations. In order to expedite the transition to the limited access mackerel program, applicants wishing to fish for mackerel with a limited access permit after March 1, 2012, must submit an application by January 31, 2012. After March 1, 2012, current mackerel permit holders who have not yet submitted an application for a limited access mackerel permit, and individuals who have submitted incomplete or unsuccessful applications for a limited access mackerel permit, will automatically be re-designated as open access permit holders under the new mackerel permit system, and will be subject to the open access possession limit described in this final rule. These applicants will receive a letter explaining the reason for the permit's return.

All applicants have until February 28, 2013, to submit an initial application.

#### Initial Confirmation of Permit History (CPH) Application

A person who does not currently own a fishing vessel, but who has owned a qualifying vessel that has sunk, been destroyed, or transferred to another person, and the applicant has lawfully retained the valid mackerel permit and fishing history, may apply for and receive a CPH. The CPH provides a benefit to a vessel owner by securing limited access eligibility through a registration system when an individual does not currently own a vessel; the individual can later transfer the permit onto a replacement vessel. To be eligible to obtain a CPH, the applicant must show that the qualifying vessel meets the eligibility requirements for the limited access mackerel permit in question. If the vessel sank, was destroyed, or was transferred before March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007. Vessel owners who are issued a CPH can obtain a vessel permit for a replacement vessel in the future, consistent with the vessel size upgrade restrictions, based upon the vessel length, tonnage, and horsepower of the vessel on which the CPH issuance is based. Applicants wishing to place their limited access mackerel permit directly into CPH will be given the same initial application deadline as applicants applying for an active limited access mackerel permit, namely from March 1, 2012, to February 28, 2013.

#### Permit Transfers

A mackerel limited access permit and fishing history is presumed to transfer with a vessel at the time it is bought, sold, or otherwise transferred from one owner to another, unless it is retained through a written agreement signed by both parties in the vessel sale or transfer.

## Multiple Vessels with One Owner

The Council proposed a provision specific to multiple vessel ownership, qualification, and replacement. The provision states that, if an individual owns more than one vessel, but only one of those vessels has the permit and landings history required to be eligible for a limited access mackerel permit, the individual can replace the vessel that it determined to be eligible with one of his/her other vessels, provided that the replacement vessel complies with the upgrade restrictions detailed below. The final rule does not contain a single regulation specific to the Council's proposed measure. Rather, the individual regulations pertaining to qualification, baselines, upgrades, and vessel replacements separately address the Council's proposed measure.

This provision does not exempt owners of multiple vessels from the permit-splitting provision, described below. For example, if a vessel owner has a limited access multispecies permit on the same vessel that created the mackerel eligibility, the entire suite of permits must be replaced onto the owner's other vessel in order to move the mackerel eligibility. In addition, if an individual owns two vessels, a 50-ft (15.2-m) vessel with a mackerel eligibility, and a 65-ft (19.8-m) vessel, the mackerel eligibility cannot be moved onto the larger vessel, because it is outside of the vessel upgrade restrictions.

## Permit Splitting

Amendment 11 adopts the permit-splitting provision currently in effect for other limited access fisheries in the region. Therefore, a limited access mackerel permit may not be issued to a vessel if the vessel's permit history was used to qualify another vessel for any other limited access permit. This means all limited access permits, including limited access mackerel permits, must be transferred as a package when a vessel is replaced or sold.

However, Amendment 11 explicitly states that the permit-splitting provision does not apply to the retention of an open access mackerel permit and fishing history that occurred prior to April 3, 2009, if any limited access permits were issued to the subject vessel. Thus, vessel owners who sold a vessel with limited access permits and retained the open access mackerel permit and landings history prior to April 3, 2009, with the intention of qualifying a different vessel for a limited access mackerel permit, are allowed to do so under Amendment 11.

#### Qualification Restriction

Consistent with previous limited access programs, no more than one vessel can qualify, at any one time, for a limited access permit or CPH based on that or another vessel's fishing and permit history, unless more than one owner has independently established fishing and permit history on the vessel during the qualification period and has either retained the fishing and permit history, as specified above, or owns the vessel at the time of initial application under Amendment 11. If more than one vessel owner claims eligibility for a limited access permit or CPH, based on a vessel's single fishing and permit history, the NMFS Regional Administrator will determine who is entitled to qualify for the permit or CPH based on information submitted and in compliance with the applicable permit provisions.

#### Appeal of Permit Denial

Amendment 11 specifies an appeals process for applicants who have been denied a limited access Atlantic mackerel permit. Applicants have two opportunities to appeal the denial of a limited access mackerel permit. The review of initial application denial appeals will be conducted under the authority of the Regional Administrator at NMFS's Northeast Regional Office. The review of second denial appeals will be conducted by a hearing officer appointed by

the Regional Administrator, or through a National Appeals program, which is under development by NMFS and may be utilized for mackerel appeals.

An appeal of the denial of an initial permit application (first level of appeal) must be made in writing to the NMFS Northeast Regional Administrator. Under this amendment, appeals must be based on the grounds that the information used by the Regional Administrator in denying the permit was incorrect. Amendment 11 requires appeals to be submitted to the Regional Administrator, postmarked no later than 30 days after the denial of an initial limited access mackerel permit application. The appeal must be in writing, must state the specific grounds for the appeal, the limited access mackerel permit category for which the applicant believes he should qualify, and information to support the appeal. The appeal shall set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. The appeal will not be reviewed without submission of information in support of the appeal. The Regional Administrator will appoint a designee to make the initial decision on the appeal.

Should the appeal be denied, the applicant is allowed to request a review of the Regional Administrator's appeal decision (second level of appeal). Such a request must be in writing postmarked no later than 30 days after the appeal decision, must state the specific grounds for the appeal, and must include information to support the appeal. A hearing will not be conducted without submission of information in support of the appeal. If the request for review of the appeal decision is not made within 30 days, the appeal decision is the final administrative action of the Department of Commerce. If the National Appeals process is not fully established at the time of the party's appeal, the Regional Administrator will appoint a hearing officer. The hearing officer will make findings and a recommendation to the Regional Administrator, which

are advisory only. The Regional Administrator's decision is the final administrative action of the Department of Commerce.

The owner of a vessel denied a limited access mackerel permit can fish for mackerel while the decision on appeal is pending, provided that the denial has been appealed, an appeal decision has not been made by the Regional Administrator, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the limited access category for which the applicant has submitted the appeal. The Regional Administrator will issue such a letter for the pendency of any appeal. If the appeal is ultimately denied under NMFS' administrative review, the Regional Administrator will send a notice of final denial to the vessel owner, and the authorizing letter becomes invalid 5 days after the receipt of the notice of denial.

#### Establishing Vessel Baselines

A vessel's baseline refers to those specifications (length overall, gross registered tonnage (GRT), net tonnage (NT), and horsepower (HP)) from which any future vessel size change is measured. The vessel baseline specifications for vessels issued a limited access mackerel permit will be the specifications of the vessel that was initially issued the limited access permit as of the date that the vessel qualifies for such a permit. If a vessel owner is initially issued a CPH instead of a mackerel permit, the attributes of the vessel that is the basis of the CPH will establish the size baseline against which future vessel limitations would be evaluated. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, then the baseline specifications associated with other limited access permits in the CPH suite will be used to establish the mackerel baseline specifications. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, the limited access mackerel eligibility was established on another vessel,

and there are no other limited access permits in the CPH suite, then the applicant must submit valid documentation of the baseline specifications of the vessel that established the eligibility. If a vessel owner applying for a CPH has a contract to purchase a vessel to replace the vessel for which CPH was issued prior to the submission of the mackerel limited access permit application (for the CPH), then the vessel under contract to be purchased will form the baseline specifications for that vessel, provided an initial application for the contract vessel to replace the vessel for which the CPH was issued is received by December 31, 2012 (1 full year after the end of the initial application period).

#### Vessel Upgrades

A vessel may be upgraded in size, whether through retrofitting or replacement, and be eligible to retain or renew a limited access permit, only if the upgrade complies with the limitations in Amendment 11. The vessel's HP can be increased only once, whether through retrofitting or vessel replacement. Such an increase cannot exceed 20 percent of the vessel's baseline specifications. The vessel's length, GRT, and NT can increase only once, whether through retrofitting or vessel replacement. Any increase in any of these three specifications of vessel size cannot exceed 10 percent of the vessel's baseline specifications. If any of these three specifications is increased, any increase in the other two must be performed at the same time. This type of upgrade can be done separately from an engine HP upgrade. Amendment 11 maintains the existing specification of maximum length, size and HP for vessels engaged in the Atlantic mackerel fishery (165 ft (50.02 m), 75) GRT (680.3 mt), and 3,000 HP). Tier 1 and Tier 2 vessels must also comply with the upgrade restrictions relevant to the vessel hold volume certification described below.

## Vessel Hold Capacity Certification

In addition to the standard baseline specifications, Tier 1 and Tier 2 vessel owners are required to obtain a fish hold capacity measurement from a certified marine surveyor. The hold capacity measurement submitted at the time of application for a Tier 1 or Tier 2 limited access mackerel permit will serve as an additional permit baseline for these permit categories. The hold volume for a Tier 1 or Tier 2 permit can only be increased once, whether through refitting or vessel replacement. Any increase cannot exceed 10 percent of the vessel's baseline hold measurement. This type of upgrade can be done separately from the size and HP upgrades. In cases where the qualifying vessel has sunk or been destroyed and the mackerel permit is issued directly into CPH, the hold capacity baseline will be the hold capacity of the first replacement vessel after the permits are removed from CPH. Applicants that qualify for a Tier 1 or 2 mackerel permit would be required to submit fish hold volume measurement by December 31, 2012, or at the first vessel replacement, whichever is sooner. This requirement was not noted in the preamble, but was included in the regulatory text in the proposed rule.

## Vessel Replacements

The term "vessel replacement," in general, refers to replacing an existing limited access vessel with another vessel. In addition to addressing increases in vessel size, hold capacity, and HP, Amendment 11 establishes a restriction requiring the same entity to own both the vessel (along with the limited access permit and fishing history) that is being replaced, and the replacement vessel.

## Voluntary Relinquishment of Eligibility

Amendment 11 includes a provision to allow a vessel owner to voluntarily exit a limited

access fishery. Such relinquishment is permanent. If a vessel's limited access permit history for the mackerel fishery is voluntarily relinquished to the Regional Administrator, no limited access permit for that fishery may be reissued or renewed based on that vessel's history.

#### Permit Renewals and CPH Issuance

Amendment 11 specifies that a vessel owner must maintain the limited access permit status for an eligible vessel by renewing the permits on an annual basis or applying for the issuance of a CPH. A vessel's limited access permit history will be cancelled due to the failure to renew each year, in which case, no limited access permit can ever be reissued or renewed based on the vessel's history or to any other vessel relying on that vessel's history. All limited access permits must be issued on an annual basis by the last day of the fishing year for which the permit is required, unless a CPH has been issued. A CPH remains valid without annual renewal until the CPH is replaced by an active vessel. A complete application for such permits must be received no later than 30 days before the last day of the permit year.

#### 3. Tier 3 Allocation and Additional Reporting Requirements

Amendment 11 establishes an allocation for participants in the limited access mackerel fishery that hold a Tier 3 permit. Tier 3 vessels will be allocated a maximum catch of up to 7 percent of the commercial mackerel quota (the remainder of the commercial mackerel quota will be available to Tier 1 or Tier 2 vessels). The 7 percent allocation will be put into effect with the 2012 specifications for the Atlantic Mackerel, Squid, and Butterfish (MSB) fisheries, prior to the effective date of the Tier 3 limited access permit. This will allow for monitoring of the cap as Tier 3 permits are issued to successful applicants. The Tier 3 allocation will be set annually during the specifications process. During a closure of the Tier 3 mackerel fishery, vessels issued

a mackerel permit may not fish for, possess, or land more than 20,000 lb (9.08 mt) of mackerel per trip. In order to monitor Tier 3 landings, Amendment 11 requires owners of vessels that hold a Tier 3 limited access mackerel permit to submit VTRs on a weekly basis.

#### 4. Open Access Permit and Possession Limit

Any vessel, even vessels that have not been issued a mackerel permit before, can be issued an open access mackerel permit that authorizes the possession and landing of up to 20,000 lb (9.07 mt) of mackerel per trip. The open access possession limit stays the same during a closure of the directed mackerel fishery.

#### 5. Updates to EFH Definitions

Amendment 11 revises the EFH text descriptions for all MSB species based on updated data from the Northeast Fisheries Science Center (NEFSC) trawl survey, the Marine Resources Monitoring Assessment and Prediction Program (MARMAP), state bottom trawl surveys, NOAA's Estuarine Living Marine Resources (ELMR) program, and scientific literature on habitat requirements. The amendment designates as EFH the area associated with 95 percent of the cumulative geometric mean catches for all MSB species. There are no regulatory provisions associated with these designations. Text descriptions and maps for the new EFH designation can be found in the FEIS.

#### 6. Recreational Mackerel Allocation

Amendment 11 establishes an allocation to the recreational fishery in order to incorporate recreational mackerel annual catch limits and accountability measures into the framework for the Council's Omnibus Amendment. The recreational allocation is set equal to 6.2 percent of the domestic mackerel allowable biological catch. This allocation corresponds to the proportion of

total U.S. mackerel landings that was accounted for by the recreational fishery from 1997-2007 times 1.5. The Council can take action via specifications, a framework adjustment, or amendment to adjust any disconnect between the recreational allocation and future recreational harvests.

#### Comments and Responses

Six comments were submitted on Amendment 11: One on behalf of O’Hara Corporation and Starlight Inc; two identical comments by the Garden State Seafood Association (GSSA) and Lund’s Fisheries Incorporated; one from the National Coalition for Marine Conservation (NCMC), a non-governmental organization devoted primarily to the conservation of highly migratory species and pelagic species such as menhaden, herring and mackerel; and two from individuals. Several issues not relevant to Amendment 11 were raised by various commenters; only the comments relevant to Amendment 11 are addressed below.

#### General Comments

Comment 1: NCMC urged NMFS to disapprove the limited access program alternatives in Amendment 11 because, in its view, the program institutionalizes a fleet structure and capacity levels that are not compatible with sustainable management of the mackerel stock, especially given uncertainty in the most recent mackerel assessment (Transboundary Resources Assessment Committee Status Report; March 2010). They commented that the estimated fleet harvest capacity for the preferred alternative is an order of magnitude higher than the long-term projected quotas available to U.S. fishermen. They noted that this excess capacity could still lead to a “race to fish,” particularly because of the large number of vessels anticipated to qualify for Tier 3, and the limited quota for this tier.

Response: NMFS acknowledges that the mackerel stock status is uncertain, but does not find this to be a reason to delay development and implementation of a limited access mackerel program. Rather than drastically reducing fleet capacity, the Council sought to stratify vessels into tiers based on historic performance in order to allow them to fish for mackerel as they had in the past. This would prevent the fleet from substantially expanding effort. The program is expected to reduce the number of vessels that will be able to land more than 20,000 lb (9.08 mt) of mackerel per trip. In 2010, there were 2,331 mackerel permit holders. Only 403 of these permit holders are expected to qualify for a limited access mackerel permit. Because an unconstrained, overcapitalized mackerel fleet is more likely to exceed fishing mortality targets, NMFS determined that the Council's measures to proactively reduce the current capacity and prevent future increases in capacity are warranted, regardless of the status of the mackerel resource. NMFS found the limited access program measures consistent with all National Standards.

NMFS agrees that the fleet resulting from the proposed limited access program is estimated in Amendment 11 to have the capacity of catching more than expected quotas for upcoming years. However, given the short mackerel fishing season, the great variability in mackerel availability, and the inability of the fleet to harvest allowable quotas, harvest capacity appears to be less of a factor in the success of the fleet. Furthermore, hard quotas have always been used as a mechanism to control mackerel harvests, and will continue to be used following implementation of the limited access program. The institution of a limited access program serves as a constraint on the number of mackerel fishery participants, and provides an indirect control on mackerel catch.

The Council designed Tier 3 to provide access to mackerel, should localized abundance occur where mackerel is not frequently targeted. NMFS determined that, because the vessels expected to qualify for Tier 3 have historically had per-trip mackerel landings well below the initial 100,000-lb (45.36-mt) trip limit (average 637 lb (0.24 mt) per trip from 1997-2007), and have typically derived a low percentage of their revenue from mackerel, it is unlikely that a race to fish will develop as a result of this tier. The trip limits for all of the Tiers can be adjusted in the future via specifications to best meet the objectives of the FMP.

Comment 2: NCMC commented that the sustainable long-term yield values for the mackerel fishery, if used as the basis for the mackerel program, must be derived from an assessment that explicitly considers the role of mackerel as forage in the ecosystem.

Response: The Council did not use sustainable long-term yield values as a basis for the limited access mackerel program. Rather, potential reductions in future harvest levels were presented as one of the justifications for reducing capacity in the fishery. Though the results of the recent mackerel assessment were inconclusive, information on the sources of natural mackerel mortality, including predation on mackerel, was considered in the assessment process. Assessment scientists are working to better incorporate ecosystem considerations, specifically the role of mackerel and other pelagic fish species as forage, in future assessments. This will also be considered by the Council's Scientific and Statistical Committee when it recommends acceptable biological catch (ABC) to the Council each year.

Comment 3: NCMC commented that the impacts of the limited access program on important forage species, such as Atlantic herring, alewife, blueback herring, and American shad, is not adequately analyzed in the FEIS.

Response: NMFS disagrees. Amendment 11 presents NMFS observer information on all species caught and discarded on observer trips and considers the effects of this action on non-mackerel species. Updates to these figures are also presented in the environmental assessments for annual MSB specifications. Mackerel and Atlantic herring are often targeted on the same trip, and landings of both species count against the ACLs established through each FMP. The Council is currently considering measures to address interactions between the mackerel fishery, river herring, and shads in MSB Amendment 14.

Comment 4: NCMC commented that new scientific information regarding spatial and interannual variability in mackerel distribution driven by changes in temperature were not taken into account in the design of the limited access program. NMFC asserts that the mackerel limited access program fails to incorporate the flexibility to address variation and contingencies in the mackerel stock, such as spatial shifts due to temperature and changes to more efficient gear that increase bycatch and reduces forage. They assert that this deficiency is inconsistent with National Standard 6.

Response: This comment fails to recognize that the limited access program is but a part of an overall management program. Variations and contingencies in the stock can be addressed through the annual specification setting process, which incorporates the latest available scientific information on the stock, including its distribution. This process also allows for the consideration and implementation of gear restrictions should they become necessary to achieve a conservation and management objective.

#### Comments on the Limited Access Permit Provisions

Comment 5: GSSA, Lund's, O'Hara Corporation and Starlight Inc., were generally

supportive of the limited access permit provisions, with the exception of the comments below. In particular, they thought the permit qualification alternatives effectively considered both historic and current fishery participants.

Response: NMFS concurs.

Comment 6: GSSA and Lund's were disappointed that alternatives to grant Tier 3 permits to limited access Atlantic herring vessels that would not otherwise qualify for limited access mackerel permits were not adopted by the Council. However, they believe that the proposed 20,000-lb (9.07-mt) trip limit for open access mackerel permits addresses the issue in an alternative way. They requested that the Council be authorized to adjust trip limits as part of the annual specifications process if it is determined that the proposed open access trip limit is not sufficient to avoid regulatory discards of mackerel in the herring fishery.

Response: NMFS agreed with the Council's determination that the open access trip limit was sufficient to prevent regulatory discards. The proposed rule included provisions to allow the Council to adjust trip limits for all mackerel permits in the annual specifications, and NMFS is implementing that provision through this final rule.

Comment 7: GSSA and Lund's expressed concerns that delays in the publication and implementation of a final rule may prevent the implementation of the limited access program on January 1, 2012.

Response: Recognizing that the implementation timeline put forward in the proposed rule may not allow for sufficient time for vessel owners to submit applications, and for NMFS to review and issue applications, the timeline has revised so that the switch to the new permit system will occur on March 1, 2012. NMFS will begin soliciting applications as soon as this

final rule publishes. Vessels that wish to fish with a limited access permit on March 1, 2012, must submit an application by January 31, 2011. As explained in the preamble, vessels that miss this date, or that apply and do not qualify for a permit, will be issued an open access permit on March 1, 2012. Vessels will ultimately have until February 28, 2013 to submit an application for a limited access mackerel permit.

Comment 8: GSSA and Lund's support the fish hold capacity measurement requirement for Tier 1 and 2 vessels. However, they expressed concerned about the feasibility of vessel owners submitting this measurement at the time of application.

Response: NMFS clarifies that the fish hold capacity measurement is not required at the time of application. Qualifiers for Tier 1 or Tier 2 permits will be required to submit the fish hold capacity measurement by December 31, 2012, or at the time of the first vessel replacement after the issuance of a Tier 1 or Tier 2 mackerel permit, whichever is sooner. This should allow sufficient time for qualifiers to gather the required documentation.

Comment 9: O'Hara Corporation and Starlight Inc., support the fish hold capacity measurement requirement. However, they disagree with the proposal to allow the hold capacity baseline for vessels that qualify into CPH to be that of the first replacement vessel. They believe that this provision creates a loophole that will allow some permit holders to circumvent the intent of capping capacity in the fishery. They feel that the proposal to establish the fish hold capacity baseline at the time a vessel becomes active in the fishery would allow unlimited increases in vessel hold size prior to bringing that vessel forward for baseline establishment, and well after all other vessels will be limited by their current hold size. They recommend that NMFS disapprove or delay the measures related to upgrade restrictions on vessel hold size, including those

recommended for CPH.

Response: NMFS disagrees that this measure should be disapproved. The proposed regulations for vessels that qualify directly into CPH state that the vessel that provides the CPH eligibility establishes the size baseline against which future vessel size limitations are evaluated. Upgrade restrictions on the other baseline measurements of the vessel that created the CPH, in particular GRT and NT, restrict the size of future replacement vessels. This, in turn, will limit any significant expansions in the fish hold capacity.

#### Recreational Mackerel Allocation

Comment 10: GSSA and Lund's opposed the decision to set the recreational allocation at 1.5 times the recreational fishery landings from 1997-2007. They believe that there has not been sufficient justification for providing the recreational sector with an allocation that exceeds actual landings in that sector.

Response: The Council selected a recreational allocation higher than actual recreational landings in order to buffer for uncertainty in recreational estimates. Past estimates have not included January or February activity, and recreational mackerel estimates are typically more uncertain than those for other species (e.g., summer flounder or bluefish). This final rule includes provisions for the Council to adjust any disconnect between the recreational allocation and actual recreational harvests via the annual specifications or a framework adjustment.

#### At-Sea Processing

Comment 11: GSSA and Lund's are disappointed that alternatives to cap at-sea processing were not adopted. They expressed concern that offshore processing could disrupt the supply of mackerel to shoreside processors, which could have negative economic impacts on

established fishing communities. They requested that the agency clarify that limits on offshore processing can be established by the Council through the specifications process. Such a provision would have to be established in an amendment to the MSB FMP.

Response: The Council did not recommend establishing a cap on at-sea processing for mackerel because economic allocation appeared to be the sole supporting rationale, which is inconsistent with National Standard 5 of the Magnuson-Stevens Act. NMFS agrees with the Council's determination. Further, NMFS can only approve or disapprove the Council's recommended measures in an amendment, and cannot put forward provisions that would allow the Council to establish a cap on at-sea processing through specifications in the future.

#### Changes from Proposed Rule to Final Rule

The final rule adjusts the timing of the implementation of the new limited access permit system (from January 1, 2012, to March 1, 2012). The final date to submit an initial application for the limited access program is changed to February 28, 2013. This rulemaking also clarifies that the fish hold measurement requirement must be submitted by Tier 1 and Tier 2 qualifiers by December 31, 2012. These timing adjustments were made to allow adequate time for applicants and qualifiers to gather and submit the required application materials, and to allow for timely processing of applications.

The proposed rule stated that applicants whose vessels sunk, were destroyed, or transferred prior to March 21, 2007, and who are applying to place their mackerel eligibility directly into CPH, could meet the permit issuance requirement if a valid federal mackerel permit was issued at any time between March 21, 2006, and March 21, 2007. This final rule extends this exemption to applicants applying for active permits, as reflected in the regulatory text

presented at § 648.4(a)(5)(iii)(c)(1). Accordingly, in this final rule, if a vessel was sunk, destroyed, or transferred before March 21, 2007, and a mackerel permit was not issued to the vessel's replacement as of March 21, 2007, the permit issuance criteria can be met if the vessel was issued a valid permit at any time between March 21, 2006, and March 21, 2007, regardless of if the applicant is applying to place a limited access mackerel permit on an active vessel, or into CPH. The extension of this provision to vessels applying for active limited access mackerel permits is a logical outgrowth of the provision put forward in the proposed rule, and eliminates an otherwise unintended adverse consequence of the proposed language.

The final regulatory text presented in this rule (§§ 628.22, 628.24, 628.25, and 628.26) differs slightly in structure, but not content, from the regulations in the proposed rule. In addition, longfin squid was previously referred to as Loligo squid. Due to a recent change in the scientific name of longfin squid from Loligo pealeii to Doryteuthis (Amerigo) pealeii, the Council will now use the common name "longfin squid" in all official documents to avoid confusion. Accordingly, the regulatory text is amended to replace all references to "Loligo" squid with the term "longfin squid."

#### Classification

The Administrator, Northeast Region, NMFS, determined that the amendment implemented by this final rule is necessary for the conservation and management of the MSB fisheries, and that it is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, has taken into account the data, views, and comments received during the comment period.

The Council prepared an FEIS for Amendment 11; the FEIS was filed with the

Environmental Protection Agency on July 1, 2011 (76 FR 38650). The FEIS describes the impacts of the proposed Amendment 11 measures on the environment. Since most of the measures would determine the level of future participation of permit holders in the mackerel fishery, the majority of the impacts are social and economic. A notice of availability was published on July 6, 2011. In approving Amendment 11 on September 30, 2011, NMFS issued a ROD identifying the selected alternatives. A copy of the ROD is available from NMFS (see ADDRESSES).

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

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS' response to those comments, and a summary of the analyses completed to support the action. A copy of the analyses is available from NMFS (see ADDRESSES).

A description of the reasons for this action, the objectives of the action, and the legal basis for the final rule is found in Amendment 11 and the preamble to the proposed rule and this final rule.

#### Statement of Need for this Action

The purpose of this action is to limit capacity in the Atlantic mackerel fishery through the implementation of a tiered limited access program; to update EFH designations for all MSB species; and to establish an allocation for the recreational mackerel fishery.

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 Proposed Rule as a Result of Such Comments

Because the implementation of this amendment will affect current and future access to the mackerel resource, the impacts of Amendment 11 are largely social and economic. The measures will have direct negative economic impacts on vessel owners that do not have a qualifying vessel or that have fished more intensely recently than during the qualifying time period. The

“Comments and Responses” section of the preamble of this final rule addresses issues relative to the IRFA in that commenters expressed concern directly and indirectly about the economic impacts of the measures and the impacts on small-scale vessel operations. NMFS’ assessment of the issues raised in comments and responses is provided in the “Comments and Responses” section of the preamble of this final rule and are not repeated here. After taking all public comments into consideration, NMFS approved Amendment 11 on September 30, 2011.

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

The measures in Amendment 11 would primarily affect participants in the mackerel fishery. All of the potentially affected businesses are considered small entities under the standards described in NMFS guidelines, because they have gross receipts that do not exceed \$4 million annually. There were 2,331 vessels issued open access mackerel permits in 2010. The Small Business Administration (SBA) size standard for commercial fishing (NAICS code 114111) is \$4 million in annual gross receipts. Available data indicate that no single fishing entity earned more than \$4 million annually. Although there are likely to be entities that, based on rules of affiliation, would qualify as large business entities, due to lack of reliable ownership affiliation data NMFS cannot apply the business size standard at this time. Data are currently

being compiled on vessel ownership that should permit a more refined assessment and determination of the number of large and small entities in the mackerel fishery for future actions. For this action, since available data are inadequate to identify affiliated vessels, each operating unit is considered a small entity for purposes of the RFA, and, therefore, there is no differential impact between small and large entities. Additionally, there are no disproportionate economic impacts on small entities. Section 6.5 in Amendment 11 describes the vessels, key ports, and revenue information for the mackerel fishery, and so that information is not repeated here.

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

This action contains several new collection-of-information, reporting, and recordkeeping requirements.

There will be an estimated 820 applications for a limited access mackerel permit. With an average processing time of 45 min, the total time burden for this application is 615 hr. Only 410 vessels are expected to qualify and consequently renew their permit via the renewal application each year. The renewal application is estimated to take 30 min on average to process, for a total burden of 205 hr. Up to 30 applicants are expected to appeal the denial of their permit application (other FMPs estimated between 5-7 percent of applications would move on to the appeal stage). The appeals process is estimated to take 2 hr to complete, on average, with a total burden of 60 hr. The 3-yr average total public cost burden for permit applications, appeals, and renewals is \$261, which includes postage and copy fees for submissions.

Each hold volume measurement done by a certified marine surveyor is estimated to cost \$4,000. An estimated 74 vessels would qualify for either a Tier 1 or Tier 2 limited access mackerel permit, and would be required to submit a hold volume measurement at the time of

permit issuance. Roughly 40 vessels are expected to upgrade or replace vessels each year, and would be required to submit a hold volume measurement for the upgraded or replacement vessel. Therefore, annual total average cost over a 3-yr period is estimated to be \$258,667 (\$98,667 for annualized initial hold volume certifications, plus \$160,000 for replacement hold volume certifications), not including travel expenses.

New limited access mackerel vessels would be subject to the same replacement, upgrade, and permit history restrictions as other limited access vessels. Completion of a replacement or upgrade application requires an estimated 3 hr per response. It is estimated that no more than 40 of the 410 vessels possessing these limited access permits will request a vessel replacement or upgrade annually. This resultant burden would be up to 120 hr. Completion of a CPH application requires an estimated 30 min per response. It is estimated that owners of no more than 30 of the 410 vessels possessing a limited access mackerel permit will request a CPH annually. The resultant burden would be up to 15 hr. The total public cost burden for replacement, upgrade, and CPH applications is \$140 for postage and copy fees.

An estimated 329 Tier 3 limited access mackerel vessels would be required to submit VTRs on a weekly basis. Completion of a VTR is estimated to take 5 min per submission. The resultant burden would be 1,151.5 hr. The total public cost burden for VTR submission is \$5,790.40 for postage.

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, 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

The following discussion also includes a description of the economic impacts of this action compared to significant non-selected alternatives as required under the RFA for inclusion in the FRFA.

### Tiered Limited Access Program

The FEIS estimates the numbers of vessel that would qualify for limited access permits under the different alternatives. In addition to the no action alternative and preferred alternative, there are six alternatives for tiered limited access programs, and two alternatives that would qualify participants in the Atlantic herring fishery for limited access mackerel permits.

Information from the dealer weighout database was used to estimate how many vessels would qualify under each of the proposed limited access alternatives. The economic impacts of these alternatives on both individual vessels and the overall capacity of mackerel fleet is described in sections 5.1.4 and 7.5 of the FEIS and are summarized below.

The composition of the qualifying group that results under each of the tiered limited access programs described in this segment changes based on each alternative. In most instances, the quota allocation and trip limit alternatives described below are averages or percentages based on the composition of the qualifying group. Accordingly, the Tier allocation and trip limit alternative sets described below are different for each of the tiered limited access program alternatives.

Under the preferred alternative, 29 vessels would qualify for a Tier 1 permit, 45 vessels would qualify for a Tier 2 permit, and 329 vessels would qualify for a Tier 3 permit, resulting in a total of 403 vessels that would qualify for the various limited access mackerel permits. The

preferred alternative would cap Tier 3 with a maximum allocation of up to 7 percent of the commercial mackerel quota, with no other additional allocations for any other Tiers. The economic impacts of the Tier allocations will be discussed separately from the structure of the limited access program.

The eligibility criteria for a Tier 1 permit in Alternative 1B would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) between January 1, 1988, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 25,000 lb (11.34 mt) between January 1, 1988, and December 31, 2007. Under Alternative 1B, 26 vessels would qualify for a Tier 1 permit, 64 vessels would qualify for a Tier 2 permit, and 56 vessels would qualify for a Tier 3 permit, resulting in a total of 146 vessels that would qualify for the various limited access mackerel permits.

The eligibility criteria for a Tier 1 permit in Alternative 1C would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) between January 1, 1997, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 1,000 lb (.45 mt) between January 1, 1997, and December 31, 2007. As with the preferred alternative, 1C would have capped Tier 3 with a maximum allocation of up to 7 percent of the commercial mackerel quota, with no other

additional allocations for any other Tiers. Under Alternative 1C, 26 vessels would qualify for a Tier 1 permit, 36 vessels would qualify for a Tier 2 permit, and 309 vessels would qualify for a Tier 3 permit, resulting in a total of 371 vessels that would qualify for the various limited access mackerel permits.

The eligibility criteria for a Tier 1 permit in Alternative 1E would have required a vessel to possess a mackerel permit and have landed at least 400,000 lb (181.44 mt) of mackerel in any one year between January 1, 1997, and December 31, 2005. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) of mackerel in any one year between January 1, 1997, and December 31, 2005. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 25,000 lb (11.34 mt) of mackerel in any one year between January 1, 1997, and December 31, 2007. Under Alternative 1E, 29 vessels would qualify for a Tier 1 permit, 25 vessels would qualify for a Tier 2 permit, and 50 vessels would qualify for a Tier 3 permit, resulting in a total of 104 vessels that would qualify for the various limited access mackerel permits.

The eligibility criteria for a Tier 1 permit in Alternative 1F would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) between January 1, 1988, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 10,000 lb (4.5 mt) between January 1, 1988, and December 31, 2007. Under Alternative 1F, 26 vessels would qualify for a Tier 1 permit, 64 vessels would qualify for a Tier 2 permit, and 121 vessels would qualify for a Tier 3

permit, resulting in a total of 211 vessels that would qualify for the various limited access mackerel permits.

Alternative 1G would implement a single-tiered limited access program for which 26 vessels would qualify. The eligibility criteria for a limited access permit would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) in any one year between January 1, 1997, and December 31, 2007.

The eligibility criteria for a Tier 1 permit in Alternative 1J would have required a vessel to possess a mackerel permit and have landed at least 1,000,000 lb (453.6 mt) of mackerel in any one year between January 1, 1997, and December 31, 2007. To qualify for a Tier 2 permit, a vessel would have been required to possess a permit and have landed at least 100,000 lb (45.36 mt) of mackerel in any one year between March 1, 1994, and December 31, 2007. To qualify for a Tier 3 permit, a vessel would have been required to possess a permit and have landed at least 25,000 lb (11.34 mt) of mackerel in any one year between March 1, 1994, and December 31, 2007. Under Alternative 1J, 26 vessels would qualify for a Tier 1 permit, 55 vessels would qualify for a Tier 2 permit, and 49 vessels would qualify for a Tier 3 permit, resulting in a total of 130 vessels that would qualify for the various limited access mackerel permits.

The number of individual qualifiers resulting from these management alternatives primarily varies based on the start date and end date of the qualifying landings period, and the required landings threshold for each Tier. A comparison of Alternatives 1B and 1C illustrates the effects of different start dates on numbers of qualifiers. Alternative 1C, which has a 1997 start date, results in 42 fewer qualifying vessels (29 fewer vessels in Tier 2, 13 fewer in Tier 3) than Alternative 1B, which has a 1988 start date. While the later start dates result in fewer

qualifiers in Tiers 2 and 3, the economic impacts on these individual vessels should not be significant when compared to their recent level of participation in the fishery. Vessels are still placed in a Tier based on their participation in the fishery since 1997, and analysis in Amendment 11 shows that lower Tiers generally derive a small percentage of their revenue (less than 2 percent for all alternatives) from mackerel.

Vessels that had sizable landings in 2006 or 2007 would be most impacted by the use of a 2005 qualifying landings period end date; this can be illustrated by comparing Alternative 1C (2007) and 1E (2005). With the 2007 end date in 1C, there would be 26 Tier 1 vessels and 35 Tier 2 vessels. If the end date is switched to 2005, as in 1E, three Tier 1 vessels and six Tier 2 vessels fall into lower Tiers. These vessels fell into lower Tiers because their best years of participation were more recent. Depending on the trip limits selected for the lower Tiers, these vessels may be negatively impacted by the earlier end date because they would be constrained compared to their recent participation in the mackerel fishery.

The FEIS presents an estimate of the maximum feasible annual capacity for the Tier 1 and Tier 2 vessels projected to qualify in each of proposed alternatives; this estimate indicates the maximum amount of mackerel the fleet could land under the various management alternatives in a single year. Only Tier 1 and Tier 2 were included in the analysis because, with the exception of Alternative 1G, the other tiers in the presented alternatives will be constrained by trip limits or tier allocations. The highest capacity estimates are associated with the no action alternative and Alternative 1G (202,111 mt). The capacity for the open access vessels is included in the estimate for Alternative 1G because of the relatively high open access trip limit alternatives associated with 1G (20,000 – 121,000 mt). Alternative 1E restricts capacity the

most, and results in a 49-percent reduction in capacity compared to the no action alternative. The least restrictive alternatives (1B and 1F) result in a 35-percent capacity reduction. The preferred alternative (1D) is the second most restrictive, and results in a 47-percent capacity reduction compared to no action. Alternatives with lower capacity, such as the preferred alternative, could provide greater long-term economic benefits to the qualifying fleet if reduced capacity contributes to the continued health of the mackerel resource.

Alternative 1H and 1I would grant Tier 3 permits to limited access Atlantic herring vessels that would not otherwise qualify for a limited access mackerel permit. Alternative 1H would award a Tier 3 permit to vessels with Category A or B herring permits, and Alternative 1I would award Tier 3 permits to vessels with Category A, B, or C herring permits. Individual vessels are known to target both mackerel and Atlantic herring on the same trip. This provision would prevent forced regulatory discards of incidentally captured mackerel on trips primarily targeting Atlantic herring, and would be expected to result in positive economic benefits for the Atlantic herring fleet. The Council ultimately did not select this alternative because it concluded that the preferred open access mackerel possession limit (20,000 lb (9.07 mt) per trip) would be sufficient to prevent regulatory discards. This alternative was not expected to have a large economic impact on the overall mackerel fishery, as this small number of vessels would be granted access to Tier 3, which would be limited by low trip limits or a Tier allocation.

#### Quota Allocation for Limited Access Tiers

The FEIS describes four alternatives for allocating the commercial mackerel quota between the limited access Tiers. These alternatives were proposed as another mechanism to ensure that each Tier in the limited access program maintained their historical level of

participation in the mackerel fishery in the future. The action alternatives would create a shared allocation for Tier 1, Tier 3, and the open access vessels, but allocate Tier 2 the percentage of total landings that Tier 2 landed from 1997-2007 (2B), double the Tier 2 percentage from 1997-2007 (2C), or triple the Tier 2 percentage from 1997-2007 (2D). Alternatives 2C and 2D feature a provision that, if less than half of Tier 2's allocation has been harvested on April 1, would transfer half of the remaining allocation to the Tier 1/Tier 3/open access allocation.

Based on public comment after the Draft Environmental Impact Statement (DEIS) was published, the Council modified alternatives 1C and 1D (preferred) to provide accommodations for smaller, historical participants in the mackerel fishery. These alternatives would result in more Tier 3 qualifiers, and would initially award Tier 3 a fairly high trip limit in order to allow the qualifiers occasional sizeable landings of mackerel. However, these alternatives would also cap Tier 3 at a maximum of 7 percent of the commercial quota, with no additional allocations for any other Tiers. Given the selection of Alternative 1D as preferred, the Council ultimately recommended the no action alternative regarding allocations for Tier 2.

All three action alternatives base the Tier 2 quota on a minimum of 100 percent of the collective landing of potential Tier 2 vessels from 1997-2007. When combined with the tiered limited access alternatives described above, the resulting Tier 2 allocations would range from 3.5 to 3.8 percent of the annual commercial mackerel quota for Alternative 2B; 7.0 to 7.7 percent of the quota for 2C; and 10.5 to 11.5 percent of the quota for 2D. Given the lower 2011 mackerel quotas, these allocations may constrain landings for all Tiers. The quota transfer provisions in 2C and 2D could benefit Tier 1 in that they would help avoid a situation where Tier 1 is closed, but Tier 2 is left open with a significant portion of its allocation unused.

The no action alternative (preferred), which also includes a cap on Tier 3 under preferred Alternative 1D, should not have substantial economic impact on most fishery participants. While Tier 3 would include an estimated 329 vessels with a relatively high trip limit, the Tier would be capped at a maximum of 7 percent of the commercial fishery allocation, so it should not affect the directed fishery. The economic impact of the Tier 2 allocations depends on Tier activity. If fishing opportunities expand for Tier 2, the no action alternative could allow Tier 2 participants to increase their activity, which could negatively impact other Tiers also attempting to access quota. On the other hand, the no action alternative could have negative impacts on Tier 2 if Tier 1 is very active in a given year and accesses a significant amount of the quota before Tier 2 vessels are able, given Tier 1's higher capacity.

#### Limited Access Trip Limits

Amendment 11 includes five trip limit alternatives in addition to the no action and preferred alternative. The trip limits analyzed in the FEIS are intended to restrict vessels to a range of landings that are characteristic of trips by vessels within a Tier. Under all alternatives, Tier 1 is not constrained by a trip limit, and all other trip limits would be established annually through specifications. The preferred alternative (3F) would initially set the trip limits at 135,000 lb (61.24 mt) for Tier 2; 100,000 lb (45.36 mt) for Tier 3; and 20,000 lb (9.07 mt) for open access. Alternatives 3B, 3C, and 3D would initially set the trip limits for Tier 2, Tier 3, and open access vessels such that 99 percent, 98 percent, and 95 percent of the trips in each would not have been affected, respectively. This would result in initial trip limits ranging from 39,000-553,000 lb (14.6-206.4 mt) for Tier 2; 4,000-100,000 lb (1.5-37.3 mt) for Tier 3; and 1,000-20,000 lb (0.4-7.5 mt) for open access, depending on the selected limited access program.

Alternative 3E initially exempts Tier 2 from a trip limit, and sets all other trip limits in the range described in Alternatives 3B-3D. Alternative 3G was designed to be selected with Alternative 1G (single-tiered alternative), and would initially set the open access trip limit in a range calculated for Tier 2 with Alternatives 3B-3D under Alternative 1B (61,000-121,000 lb; 22.8-45.2 mt).

The alternatives analyzed in the FEIS were designed to establish trip limits that would be higher than historical landings for a majority of the fleet. Accordingly, none of the proposed trip limits are expected to have a negative economic impact on most of the mackerel fleet. In addition, the Tiers with trip limits typically derive a small percentage of their revenue from mackerel (less than 2 percent), so the trip limits are not expected to limit the contribution of mackerel to these vessels' annual revenue. In the event that mackerel availability increases in the future, the trip limits will benefit all mackerel fishery participants in that they will keep vessels in one Tier from significantly expanding effort to the point that their activity is characteristic of a higher Tier; put another way, trip limits could reduce additional capitalization, which could have long-term economic benefits if lower fishery capacity helps sustain the mackerel resource.

#### Limited Access Permit Provisions

Amendment 11 includes most of the provisions adopted in other limited access fisheries in the Northeast Region to govern the initial qualification process, future ownership changes, and vessel replacements. For the most part, these provisions have no direct economic impact on applicants that qualify for limited access mackerel permits. The nature of a limited access program requires rules for governing the transfer of limited access fishing permits. The

procedures have been relatively standard for previous limited access programs, which makes it easier for a vessel owner issued permits for several limited access fisheries to undertake vessel transactions. The standard provisions adopted in Amendment 11 are those governing change in ownership; replacement vessels; CPH; abandonment or voluntary relinquishment of permits; and appeal and denial of permits. This action would also allow a vessel owner to retain an open access mackerel fishing history prior to the implementation of Amendment 11 to be eligible for issuance of a mackerel permit based on the eligibility of the vessel that was sold, even if the vessel was sold with other limited access permits.

The economic impacts of the limited access permit provisions are analyzed in section 7.5.4 of the Amendment 11 document. The preferred alternative that requires hold volume measurements for Tier 1 and Tier 2 vessels would cost qualifiers for these permits an estimated \$4,000 per vessel, not including travel expenses, and would prevent such vessels from increasing hold volume by more than 10 percent through refitting or replacement. This provision, and other provisions that restrict vessel upgrades, may constrain future business opportunities for vessels with immediate plans for vessel refitting or replacement. However, these restrictions may have long-term benefits to fishery participants by limiting capitalization in the mackerel fishery. The proposed regulations regarding qualification with retained vessel histories may have positive economic impacts for participants that sold their vessel but retained their mackerel fishing history. However, this provision could result in more vessels qualifying for mackerel permits, which may result in increased fishery capitalization. This could have a negative impact on the mackerel fleet if any additional capitalization impacts the sustained health of the mackerel resource. The preferred alternative requiring weekly VTR submissions from Tier 3 vessels is

expected to cost an additional total of \$5,790.40 annually in postage for all qualifiers.

#### EFH Updates

EFH designations identify the geographic domain where fishery management measures could be established to minimize the adverse impacts of fishing and non-fishing activities on MSB species. The no action alternative would maintain the current text and map designations for EFH for all MSB species and life stages. The preferred alternative would designate as EFH the area associated with 90 percent of the cumulative geometric mean catches for non-overfished species, and the area associated with 95 percent of the cumulative geometric mean catches for unknown or overfished species. The three non-preferred alternatives vary slightly from the preferred, and include: (1) 75 percent area for non-overfished species, 90 percent for unknown or overfished species; (2) 95 percent area for non-overfished species, 100 percent for unknown or overfished species; and (3) 100 percent for all species.

With the exception of egg life stage for longfin squid, all of the MSB species are pelagic and have life stages that inhabit the water column. Because the fishing gears that have the potential to adversely impact EFH are bottom-tending, the EFH for MSB species is not vulnerable to fishing impacts. None of the EFH alternatives analyzed in Amendment 11 would result in regulations affecting fishing activity. Accordingly, none of analyzed alternatives are expected to have negative economic impact on the fishing industry. Overall, the preferred alternative would allow for more effective consultations on oversight of EFH when compared to current EFH definitions, which could have positive impacts on the MSB resource.

#### Recreational Mackerel Allocation

The commercial fishery for mackerel currently closes when it reaches 90 percent of the

total mackerel quota (commercial plus recreational). It is assumed that the recreational fishery will harvest 15,000 mt of the commercial quota each year, regardless of the total commercial quota, but there is no hard allocation for the recreational fishery. The no action alternative would maintain the assumption that the recreational mackerel fishery could harvest 15,000 mt of the commercial quota. If the mackerel fishery is closed at 90 percent of the commercial quota, and the recreational fishery was actually able to harvest the assumed 15,000 mt, the mackerel quota would be exceeded. For example, the commercial mackerel quota for the 2011 fishing year is 46,779 mt. If the commercial mackerel fishery is closed when 90 percent of this quota is attained (42,101 mt), and the recreational mackerel fishery has harvested the assumed 15,000 mt, then the mackerel quota would be exceeded by 22 percent ( $42,101 \text{ mt} + 15,000 \text{ mt} = 57,101 \text{ mt}$ ). Mackerel quota overages can compromise the sustainability of the resource, resulting in negative long-term economic impacts on the fishery.

The preferred alternative would designate an allocation for the recreational mackerel fishery that corresponds to the proportion of total U.S. landings that were accounted for by the recreational fishery from 1997-2007 times 1.5 (6.2 percent of total U.S. mackerel landings). Other alternatives include an allocation equal to the proportion of U.S. landings accounted for by the recreational mackerel fishery during this period (4.1 percent), and two times the proportion from this period (8.2 percent).

The allocation is unlikely to constrain the current operations of the recreational mackerel fishery. Recreational landings from 2000-2009 ranged from 530-1,633 mt, with average recreational landings of 774 mt from 2007-2009. Under the preferred alternative, the recreational sector would have received an allocation of 2,900 mt in 2011 (6.2 percent of 46,779

mt). Given recent reduced mackerel quotas, the preferred recreational mackerel allocation could constrain the commercial mackerel fishery compared to the no action alternative. However, the constraint on the commercial fishery is more related to the overall quota than to any of the potential recreational allocations considered in Amendment 11.

#### At-Sea Processing

Finally, Amendment 11 considered the establishment of a cap for at-sea processing via transfers for the mackerel fishery. The action alternatives included caps on at-sea processing initially set equal to 7 percent, 14 percent, 21 percent, 50 percent, or 75 percent of the mackerel initial optimum yield (IOY), with the cap set annually through specifications. Though there has not been at-sea processing for mackerel by mother ship-type processors since the foreign fishery ended in the early 1990s, the Council developed this set of alternatives in response to public comment about the potential impacts if large-scale at-sea processing of mackerel were to commence in the future. In particular, commenters noted that, if there were significant amounts of at-sea mackerel processing, the disruption of the supply of mackerel to land-based processors could have negative economic impacts on fishing communities.

There is little information available about the possible impacts of at-sea processing in the mackerel fishery. Under the preferred no action alternative, if at-sea processing were to become significant for mackerel, an unlimited portion of the mackerel market share could be transferred to at-sea processors. Land-based mackerel processors, and the shoreside communities in which they reside, would be impacted to the extent that mackerel processing shifts to the at-sea operations. Limiting at-sea processing (action alternatives) could have economic benefits by ensuring a portion of the mackerel supply would still be available to land-based mackerel

processors.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all vessels owners that hold permits administered by the NMFS Northeast Regional Office. 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).

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: November 2, 2011.

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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 § 648.4, paragraph (a)(5)(iii) is revised, and paragraph (c)(2)(vii) is added to read as follows:

§ 648.4 Vessel permits.

(a)\* \* \*

(5)\* \* \*

(iii) Limited access Atlantic mackerel permits. (A) Vessel size restriction. A vessel of the United States is eligible for and may be issued an Atlantic mackerel permit to fish for, possess, or land Atlantic mackerel in or from the EEZ, except for any vessel that is greater than or equal to 165 ft (50.3 m) in length overall (LOA), or greater than 750 gross registered tons (680.4 mt), or the vessel's total main propulsion machinery is greater than 3,000 horsepower. Vessels that exceed the size or horsepower restrictions may seek to obtain an at-sea processing permit specified in § 648.6(a)(2)(i).

(B) Limited access mackerel permits. A vessel of the United States that fishes for, possesses, or lands more than 20,000 lb (7.46 mt) of mackerel per trip, except vessels that fish exclusively in state waters for mackerel, must have been issued and carry on board one of the limited access mackerel permits described in paragraphs (a)(5)(iii)(B)(1) through (3) of this section, including both vessels engaged in pair trawl operations.

(1) Tier 1 Limited Access Mackerel Permit. A vessel may fish for, possess, and land mackerel not subject to a trip limit, provided the vessel qualifies for and has been issued this

permit, subject to all other regulations of this part.

(2) Tier 2 Limited Access Mackerel Permit. A vessel may fish for, possess, and land up to 135,000 lb (50 mt) of mackerel per trip, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(3) Tier 3 Limited Access Mackerel Permit. A vessel may fish for, possess, and land up to 100,000 lb (37.3 mt) of mackerel per trip, provided the vessel qualifies for and has been issued this permit, subject to all other regulations of this part.

(C) Eligibility criteria for mackerel permits. A vessel is eligible for and may be issued a Tier 1, Tier 2, or Tier 3 Limited Access Mackerel Permit if it meets the permit history criteria in paragraph (a)(5)(iii)(C)( 1 ) of this section and the relevant landings requirements specified in paragraphs (a)(5)(iii)(C)( 2 ) through ( 4 ) of this section. The permit criteria and landings requirement must either be derived from the same vessel, or joined on a vessel through replacement prior to March 21, 2007.

(1) Permit history criteria for Limited Access Mackerel Permits. (i) The vessel must have been issued a Federal mackerel permit that was valid as of March 21, 2007. The term “as of” means that the vessel must have had a valid mackerel permit on March 21, 2007.

(ii) The vessel is replacing a vessel that was issued a Federal mackerel permit that was valid as of March 21, 2007. To qualify as a replacement vessel, the replacement vessel and the vessel being replaced must both be owned by the same vessel owner; or if the vessel being replaced was sunk or destroyed, the vessel owner must have owned the vessel being replaced at the time it sunk or was destroyed; or, if the vessel being replaced was sold to another person, the vessel owner must provide a copy of a written agreement between the buyer of the vessel being

replaced and the owner/seller of the vessel, documenting that the vessel owner/seller retained the mackerel permit and all mackerel landings history.

(iii) If the vessel sank, was destroyed, or was transferred before March 21, 2007, and a mackerel permit was not issued to a replacement vessel as of March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007.

(2) Landings criteria for Limited Access Mackerel Permits. (i) Tier 1. The vessel must have landed at least 400,000 lb (149.3 mt) of mackerel in any one calendar year between January 1, 1997, and December 31, 2005, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(5)(iii)(C)(2)(iv) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(5)(iii)(C)(1)(ii) of this section.

(ii) Tier 2. The vessel must have landed at least 100,000 lb (37.3 mt) of mackerel in any one calendar year between March 1, 1994, and December 31, 2005, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(5)(iii)(C)(2)(iv) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(5)(iii)(C)(1)(ii) of this section.

(iii) Tier 3. The vessel must have landed at least 1,000 lb (0.4 mt) of mackerel in any one

calendar year between March 1, 1994, and December 31, 2005, as verified by dealer reports submitted to NMFS or documented through valid dealer receipts, if dealer reports were not required by NMFS. The owners of vessels that fished in pair trawl operations may provide landings information as specified in paragraph (a)(5)(iii)(C)(2)(iv) of this section. Landings made by a vessel that is being replaced may be used to qualify a replacement vessel consistent with the requirements specified in paragraph (a)(5)(iii)(C)(1)(ii) of this section.

(iv) Landings criteria for vessels using landings from pair trawl operations. To qualify for a limited access permit using landings from pair trawl operations, the owners of the vessels engaged in that operation must agree on how to divide such landings between the two vessels and apply for the permit jointly, as supported by the required NMFS dealer reports or signed dealer receipts.

(3) CPH. A person who does not currently own a fishing vessel, but owned a vessel that satisfies the permit eligibility requirement in paragraphs (a)(5)(iii)(B)(1) and (2) of this section that has sunk, been destroyed, or transferred to another person without its fishing and permit history, and that has not been replaced, may apply for and receive a CPH. A CPH allows for a replacement vessel to obtain the relevant limited access mackerel permit if the fishing and permit history of such vessel has been retained lawfully by the applicant as specified in paragraph (a)(5)(iii)(C)(1)(ii) of this section. If the vessel sank, was destroyed, or was transferred before March 21, 2007, the permit issuance criteria may be satisfied if the vessel was issued a valid Federal mackerel permit at any time between March 21, 2006, and March 21, 2007.

(D) Application/renewal restrictions. See paragraph (a)(1)(i)(B) of this section. Applications for a limited access mackerel permit described in paragraph (a)(5)(iii) of this

section must be postmarked no later than February 28, 2013. Applications for limited access mackerel permits that are not postmarked before February 28, 2013, will not be processed because of this regulatory restriction, and returned to the sender with a letter explaining the reason for its return.

(E) Qualification restrictions. (1) See paragraph (a)(1)(i)(C) of this section. The following restrictions in paragraphs (a)(5)(iii)(E)(2) and (3) of this section are applicable to limited access mackerel permits.

(2) Mackerel landings history generated by separate owners of a single vessel at different times during the qualification period for limited access mackerel permits may be used to qualify more than one vessel, provided that each owner applying for a limited access mackerel permit demonstrates that he/she created distinct fishing histories, that such histories have been retained, and if the vessel was sold, that each applicant's eligibility and fishing history is distinct. In such a case, each applicant would still need to have been issued a valid mackerel permit as of March 21, 2007, in order to create a full eligibility, as detailed in paragraph (a)(5)(iii)(C) of this section.

(3) A vessel owner applying for a limited access mackerel permit who sold or transferred a vessel with non-mackerel limited access permits, as specified in paragraph (a)(1)(i)(D) of this section, and retained only the mackerel permit and landings history of such vessel as specified in paragraph (a)(1)(i)(D) of this section, before April 3, 2009, may use the mackerel history to qualify a different vessel for the initial limited access mackerel permit, regardless of whether the history from the sold or transferred vessel was used to qualify for any other limited access permit. Such eligibility may be used if the vessel for which the initial limited access mackerel permit has been submitted meets the upgrade restrictions described at paragraph (a)(5)(iii)(H) of

this section. Applicants must be able to provide baseline documentation for both vessels in order to be eligible to use this provision.

(F) Change of ownership. See paragraph (a)(1)(i)(D) of this section.

(G) Replacement vessels. See paragraph (a)(1)(i)(E) of this section.

(H) Vessel baseline specification. (1) In addition to the baseline specifications specified in paragraph (a)(1)(i)(H) of this section, the volumetric fish hold capacity of a vessel at the time it was initially issued a Tier 1 or Tier 2 limited access mackerel permit will be considered a baseline specification. The fish hold capacity measurement must be certified by an individual credentialed as a Certified Marine Surveyor with a fishing specialty by the National Association of Marine Surveyors (NAMS) or from an individual credentialed as an Accredited Marine Surveyor with a fishing specialty by the Society of Accredited Marine Surveyors (SAMS). Vessels that are sealed by the Maine State Sealer of Weights and Measures will also be deemed to meet this requirement. Owners whose vessels qualify for a Tier 1 or Tier 2 mackerel permit must submit a certified fish hold capacity measurement to NMFS by December 31, 2012, or with the first vessel replacement application after a vessel qualifies for a Tier 1 or Tier 2 mackerel permit, whichever is sooner.

(2) If a mackerel CPH is initially issued, the vessel that provided the CPH eligibility establishes the size baseline against which future vessel size limitations shall be evaluated, unless the applicant has a vessel under contract prior to the submission of the mackerel limited access application. The replacement application to move permits onto the contracted vessel must be received by December 31, 2013. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, then the baseline specifications associated with other limited access permits

in the CPH suite will be used to establish the mackerel baseline specifications. If the vessel that established the CPH is less than 20 ft (6.09 m) in length overall, the limited access mackerel eligibility was established on another vessel, and there are no other limited access permits in the CPH suite, then the applicant must submit valid documentation of the baseline specifications of the vessel that established the eligibility. The hold capacity baseline for such vessels will be the hold capacity of the first replacement vessel after the permits are removed from CPH. Hold capacity for the replacement vessel must be measured pursuant to paragraph (a)(5)(iii)(H)( 1 ) of this section.

(I) Upgraded vessel. See paragraph (a)(1)(i)(F) of this section. In addition, for Tier 1 and Tier 2 limited access mackerel permits, the replacement vessel's volumetric fish hold capacity may not exceed by more than 10 percent the volumetric fish hold capacity of the vessel's baseline specifications. The modified fish hold, or the fish hold of the replacement vessel, must be resurveyed by a surveyor (accredited as in paragraph (a)(5)(iii)(H) of this section) unless the replacement vessel already had an appropriate certification.

(J) Consolidation restriction. See paragraph (a)(1)(i)(G) of this section.

(K) Confirmation of permit history. See paragraph (a)(1)(i)(J) of this section.

(L) Abandonment or voluntary relinquishment of permits. See paragraph (a)(1)(i)(K) of this section.

(M) Appeal of permit denial. (1) Eligibility. Any applicant eligible to apply for a limited access mackerel permit who is denied such permit may appeal the denial to the Regional Administrator within 30 days of the notice of denial.

(2) Appeal review. Applicants have two opportunities to appeal the denial of a limited

access mackerel permit. The review of initial appeals will be conducted under the authority of the Regional Administrator at NMFS's Northeast Regional Office. The Regional Administrator shall appoint a hearing officer for review of second denial appeals.

(i) An appeal of the denial of an initial permit application (first level of appeal) must be made in writing to NMFS Northeast Regional Administrator. Appeals must be based on the grounds that the information used by the Regional Administrator in denying the permit was incorrect. The only items subject to appeal are the accuracy of the amount of landings, and the correct assignment of landings to a vessel and/or permit holder. Appeals must be submitted to the Regional Administrator, postmarked no later than 30 days after the denial of an initial limited access mackerel permit application. The appeal shall set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. The appeal must be in writing, must state the specific grounds for the appeal, and include information to support the appeal. The appellant may also request a letter of authorization (LOA), as described in paragraph (a)(5)(iii)(M)(3) of this section. If the appeal of the denial of the permit application is not made within 30 days, the denial of the permit application shall constitute the final decision of the Department of Commerce. The appeal will not be reviewed without submission of information in support of the appeal. The Regional Administrator will appoint a designee to make the initial decision on the appeal.

(ii) Should the appeal of the denial of the permit application be denied, the applicant may request a hearing to review the Regional Administrator's initial decision denying the first level appeal (second level of appeal). Such a request must be in writing, postmarked no later than 30 days after the appeal decision, must state the specific grounds for the hearing request,

and must include information to support the hearing request. If the request for a hearing to review of the decision denying the first level of appeal is not made within 30 days, the initial decision will constitute the final decision of the Department of Commerce. If the hearing request is submitted without information in support of the request, the appeal will not be reviewed in a hearing, and the initial decision will constitute the final decision of the Department of Commerce. The Regional Administrator will appoint a hearing officer or the hearing process may take place within the National Appeals program. The hearing officer shall make findings and a recommendation to the Regional Administrator, which shall be advisory only. The Regional Administrator's decision is the final decision of the Department of Commerce.

(3) A vessel denied a limited access mackerel permit may fish for mackerel while the decision on the appeal is pending within NMFS, provided that the denial has been appealed, the appeal is pending, and the vessel has on board a letter from the Regional Administrator authorizing the vessel to fish under the limited access category for which the applicant has submitted an appeal. A request for an LOA must be made when submitting an appeal of the denial of the permit application. The Regional Administrator will issue such a letter for the pending period of any appeal. The LOA must be carried on board the vessel. If the appeal is finally denied, the Regional Administrator shall send a notice of final denial to the vessel owner; the authorizing letter becomes invalid 5 days after the receipt of the notice of denial, but no later than 10 days from the date of the letter of denial.

(iv) Atlantic mackerel incidental catch permits. Any vessel of the United States may obtain a permit to fish for or retain up to 20,000 lb (7.46 mt) of Atlantic mackerel as an incidental catch in another directed fishery, provided that the vessel does not exceed the size

restrictions specified in paragraph (a)(5)(iii)(A) of this section. The incidental catch allowance may be revised by the Regional Administrator based upon a recommendation by the Council following the procedure set forth in § 648.21.

(v) Party and charter boat permits. The owner of any party or charter boat must obtain a permit to fish for, possess, or retain in or from the EEZ mackerel, squid, or butterfish while carrying passengers for hire.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(vii) The owner of a vessel that has been issued a Tier 1 or Tier 2 limited access mackerel must submit a volumetric fish hold certification measurement, as described in paragraph (a)(5)(iii)(H) of this section, with the permit renewal application for the 2013 fishing year.

\* \* \* \* \*

3. In § 648.7, paragraph (f)(2)(i) is revised to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(i) For any vessel not issued a NE multispecies, Atlantic herring permit, or Tier 3 Limited Access mackerel permit, fishing vessel log reports, required by paragraph (b)(1)(i) of this section, must be postmarked or received by NMFS within 15 days after the end of the reporting month. If no fishing trip is made during a particular month for such a vessel, a report stating so

must be submitted, as instructed by the Regional Administrator. For any vessel issued a NE multispecies permit, Atlantic herring permit, or a Tier 3 Limited Access mackerel permit, fishing vessel log reports must be postmarked or received by midnight of the first Tuesday following the end of the reporting week. If no fishing trip is made during a reporting week for such a vessel, a report stating so must be submitted and received by NMFS by midnight of the first Tuesday following the end of the reporting week, as instructed by the Regional Administrator. For the purposes of this paragraph (f)(2)(i), the date when fish are offloaded will establish the reporting week or month that the VTR must be submitted to NMFS, as appropriate. Any fishing activity during a particular reporting week (i.e., starting a trip, landing, or offloading catch) will constitute fishing during that reporting week and will eliminate the need to submit a negative fishing report to NMFS for that reporting week. For example, if a vessel issued a NE multispecies permit, Atlantic herring permit, or Tier 3 Limited Access Mackerel Vessel begins a fishing trip on Wednesday, but returns to port and offloads its catch on the following Thursday (i.e., after a trip lasting 8 days), the VTR for the fishing trip would need to be submitted by midnight Tuesday of the third week, but a negative report (i.e., a “did not fish” report) would not be required for either earlier week.

\* \* \* \* \*

4. In § 648.14, paragraph (g)(1)(iii) is removed; paragraphs (g)(2)(ii)(C), (D), and (E) are revised, and paragraphs (g)(2)(ii)(F), (g)(2)(iii)(D) and (g)(2)(iv) are added to read as follows:

§ 648.14 Prohibitions.

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(C) Possess more than the incidental catch allowance of mackerel, unless issued a Limited Access mackerel permit.

(D) Take, retain, possess, or land mackerel, squid, or butterfish in excess of a possession limit specified in § 648.26.

(E) Possess 5,000 lb (2.27 mt) or more of butterfish, unless the vessel meets the minimum mesh requirements specified in § 648.23(a).

(F) Take, retain, possess, or land mackerel, squid, or butterfish after a total closure specified under § 648.24.

\* \* \* \* \*

(iii) \* \* \*

(D) If fishing with midwater trawl or purse seine gear, fail to comply with the requirements of § 648.80(d) and (e).

\* \* \* \* \*

(iv) Observer requirements for longfin squid fishery. Fail to comply with any of the provisions specified in § 648.27.

\* \* \* \* \*

6. In § 648.22, paragraphs (a)(3), (b)(2)(iv)(A) introductory text, (c)(3), (c)(6), and (c)(9) are revised to read as follows:

§ 648.22 Atlantic mackerel, squid, and butterfish specifications.

(a) \* \* \*

(3) ACL; commercial ACT, including RSA, DAH, Tier 3 allocation (up to 7 percent of the DAH), DAP; JVP if any; TALFF, if any; and recreational ACT, including RSA for mackerel; which, subject to annual review, may be specified for a period of up to 3 years. The Monitoring Committee may also recommend that certain ratios of TALFF, if any, for mackerel to purchases of domestic harvested fish and/or domestic processed fish be established in relation to the initial annual amounts.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iv) \* \* \*

(A) Commercial sector ACT. Commercial ACT is composed of RSA, DAH, Tier 3 allocation (up to 7 percent of DAH), dead discards, and TALFF, if any. RSA will be based on requests for research quota as described in paragraph (g) of this section. DAH, Tier 3 allocation (up to 7 of the DAH), DAP, and JVP will be set after deduction for RSA, if applicable, and must be projected by reviewing data from sources specified in paragraph (b) of this section and other relevant data, including past domestic landings, projected amounts of mackerel necessary for domestic processing and for joint ventures during the fishing year, projected recreational landings, and other data pertinent for such a projection. The JVP component of DAH is the portion of DAH that domestic processors either cannot or will not use. Economic considerations for the establishment of JVP and TALFF include:

\* \* \* \* \*

(c) \* \* \*

(3) The amount of longfin squid, Illex, and butterfish that may be retained and landed by vessels issued the incidental catch permit specified in § 648.4(1)(5)(ii), and the amount of mackerel that may be retained, possessed and landed by any of the limited access mackerel permits described at § 648.4(1)(5)(iii) and the incidental mackerel permit at § 648.4(1)(5)(iv).

\* \* \* \* \*

(6) Commercial seasonal quotas/closures for longfin squid and Illex, and allocation for the Limited Access Mackerel Tier 3.

\* \* \* \* \*

(9) Recreational allocation for mackerel.

\* \* \* \* \*

7. In § 648.24, paragraph (b)(1) is revised to read as follows:

§ 648.24 Fishery closures and accountability measures.

\* \* \* \* \*

(b) \* \* \*

(1) Mackerel commercial sector EEZ closure. (i) NMFS will close the commercial mackerel fishery in the EEZ when the Regional Administrator projects that 90 percent of the mackerel DAH will be harvested, if such a closure is necessary to prevent the DAH from being exceeded. The closure of the directed fishery shall be in effect for the remainder of that fishing period, with incidental catches allowed as specified in § 648.26. When the Regional Administrator projects that the DAH for mackerel will be landed, NMFS will close the mackerel fishery in the EEZ and the incidental catches specified for mackerel at § 648.26 will be

prohibited.

(ii) NMFS will close the Tier 3 commercial mackerel fishery in the EEZ when the Regional Administrator projects that 90 percent of the Tier 3 mackerel allocation will be harvested, if such a closure is necessary to prevent the DAH from being exceeded. The closure of the Tier 3 commercial mackerel fishery will be in effect for the remainder of that fishing period, with incidental catches allowed as specified in § 648.26.

\* \* \* \* \*

8. In §648.25, paragraph (a)(1) is revised to read as follows:

§ 648.25 Atlantic mackerel, squid, and butterfish framework adjustments to management measures.

(a) \* \* \*

(1) Adjustment process. The MAFMC shall develop and analyze appropriate management actions over the span of at least two MAFMC meetings. The MAFMC must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting and prior to and at the second MAFMC meeting. The MAFMC's recommendations on adjustments or additions to management measures must come from one or more of the following categories: Adjustments within existing ABC control rule levels; adjustments to the existing MAFMC risk policy; introduction of new AMs, including sub-ACTs; minimum fish size; maximum fish size; gear restrictions; gear requirements or prohibitions; permitting restrictions, recreational allocation, recreational possession limit; recreational seasons; closed areas; commercial seasons; commercial trip limits; commercial

quota system, including commercial quota allocation procedure and possible quota set-asides to mitigate bycatch; recreational harvest limit; annual specification quota setting process; FMP Monitoring Committee composition and process; description and identification of EFH (and fishing gear management measures that impact EFH); description and identification of habitat areas of particular concern; overfishing definition and related thresholds and targets; regional gear restrictions; regional season restrictions (including option to split seasons); restrictions on vessel size (LOA and GRT) or shaft horsepower; changes to the Northeast Region SBRM (including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs); any other management measures currently included in the FMP, set aside quota for scientific research, regional management, and process for inseason adjustment to the annual specification. Measures contained within this list that require significant departures from previously contemplated measures or that are otherwise introducing new concepts may require amendment of the FMP instead of a framework adjustment.

\* \* \* \* \*

9. In § 648.26, paragraph (a) is revised to read as follows:

§ 648.26 Mackerel, squid, and butterfish possession restrictions.

(a) Atlantic mackerel. (1) A vessel must be issued a valid limited access mackerel permit to fish for, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel from or in the EEZ per trip, provided that the fishery has not been closed because 90 percent of the DAH has been harvested, as specified in § 648.24(b)(1)(i).

(i) A vessel issued a Tier 1 Limited Access Mackerel Permit is authorized to fish for,

possess, or land Atlantic mackerel with no possession restriction in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours, provided that the fishery has not been closed because 90 percent of the DAH has been harvested, as specified in § 648.24(b)(1)(i).

(ii) A vessel issued a Tier 2 Limited Access Mackerel Permit is authorized to fish for, possess, or land up to 135,000 lb (61.23 mt) of Atlantic mackerel in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours, provided that the fishery has not been closed because 90 percent of the DAH has been harvested, as specified in § 648.24(b)(1)(i).

(iii) A vessel issued a Tier 3 Limited Access Mackerel Permit is authorized to fish for, possess, or land up to 100,000 lb (45.36 mt) of Atlantic mackerel in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours, provided that the fishery has not been closed because 90 percent of the Tier 3 allocation has been harvested, or 90 percent of the DAH has been harvested, as specified in § 648.22(b)(1)(i) and (ii).

(iv) A vessel issued an open access mackerel permit may fish for, possess, or land up to 20,000 lb (9.08 mt) of Atlantic mackerel in the EEZ per trip, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(v) Both vessels involved in a pair trawl operation must be issued a valid mackerel permits to fish for, possess, or land Atlantic mackerel in the EEZ. Both vessels must be issued the mackerel permit appropriate for the amount of mackerel jointly possessed by both of the

vessels participating in the pair trawl operation.

(2) Mackerel closure possession restrictions. (i) Commercial mackerel fishery. During a closure of the commercial Atlantic mackerel fishery, including closure of the Tier 3 fishery, vessels issued a Limited Access Mackerel Permit may not fish for, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel per trip at any time, and may only land Atlantic mackerel once on any calendar day, which is defined as the 24-hr period beginning at 0001 hours and ending at 2400 hours.

(ii) [Reserved]

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