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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XE205**

**Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Eel Fishery**

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

**ACTION:** Notice of determination of non-compliance; declaration of a moratorium.

**SUMMARY:** In accordance with the Atlantic Coastal Fisheries Cooperative Management Act (Act), NMFS, upon a delegation of authority from the Secretary of Commerce (Secretary), has determined that the State of Delaware has failed to carry out its responsibilities under the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan for American Eel (Plan) and that the measures Delaware has failed to implement and enforce are necessary for the conservation of the American eel resource. This determination is consistent with the findings of the Commission on August 6, 2015. Pursuant to the Act, a Federal moratorium on fishing, possession, and landing of all American eel is hereby declared and will be effective on March 18, 2016. The moratorium will be withdrawn by NMFS when Delaware is found to have come back into compliance with the Commission's Plan for American Eel.

**DATES:** Effective March 18, 2016.

**ADDRESSES:** Alan Risenhoover, Director, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Room 13362, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Derek Orner, Fishery Management Specialist, NMFS Office of Sustainable Fisheries, (301) 427-8567.

**SUPPLEMENTARY INFORMATION:**

**Non-Compliance Statutory Background**

The Atlantic Coastal Act, 16 U.S.C. 5101 *et seq.*, sets forth a non-compliance review and determination process that is triggered when the Commission finds that a State has not implemented measures specified in an Interstate Fishery Management Plan (ISFMP) and refers that determination to the Secretary for review and potential concurrence.

The Atlantic Coastal Act's non-compliance process involves two stages of decision-making. In the first stage, the Secretary (delegated to the AA) must make two findings: 1) whether the State in question has failed to carry out its responsibility under the Commission's ISFMP; and if so 2) whether the measures that the State failed to implement and enforce are necessary for the conservation of the fishery in question. These initial findings must be made within 30 days after receipt of the Commission's non-compliance referral and consequently, this first stage of decision-making is referred to as the 30-Day Determination.

A positive 30-Day Determination triggers the second stage of Atlantic Coastal Act non-compliance decision-making, which occurs contemporaneous with the first decision. That is, if the AA determines non-compliance in the first stage, the Act mandates that a moratorium on fishing in State waters in the fishery in question occur. The timing of the moratorium, however, is at the discretion of the AA, so long as it is implemented within six (6) months of the 30-Day

Determination. In other words, although the implementation of the moratorium is non-discretionary, the AA has the discretion to decide when the moratorium will be implemented subject to the Act's six (6) month deadline.

### **Commission Referral of Non-Compliance**

On August 6, 2015, the Commission found that the State of Delaware is out of compliance with the Commission Plan. Specifically, the Commission found that Delaware has not implemented regulations that are necessary to rebuild the depleted American eel stock, and to ensure sustainable commercial and recreational harvest while preventing over-harvest of any eel life stage. The required measures that Delaware failed to implement are as follows:

#### *Commercial Measures*

The following measures apply to all current yellow eel commercial fisheries. The development of any future yellow eel fisheries would be subject to the following measures:

Minimum size and mesh requirements - It is generally accepted that American eel in the northern portion of the species' range are larger than eel in the southern end of the range. However, there is not enough information at this time to develop regional or state specific maximum sizes for the coast. Nonetheless, there is growing concern about the development of fisheries on small yellow eels and an increase in the minimum size is a means to prevent this fishery from developing further. The benefit of effective gear restrictions is smaller eels are not landed, thus eliminating the need for harvesters to handle these fish or enforcement having to measure fish. No gear requirements are sought to exclude larger eels from pots at this time because only a low number of silver eels are caught in pot fisheries. Gear restrictions that are instituted should be monitored for effectiveness. States and jurisdictions are required to adopt a nine (9) inch minimum size

limit for all yellow eel fisheries. Harvesters are required to sort their catch and discard eels smaller than the size limit.

States and jurisdictions are required to implement a ½” by ½” minimum on the mesh size used in commercial yellow eel pots. States may allow, for up to three years starting January 1, 2014, the use of a 4 by 4 inch escape panel constructed of a mesh size of at least ½” by ½” inch mesh in order to reduce the financial burden of gear changes on the fishery.

### *Recreational Measures*

The following measures apply to all current yellow eel recreational fisheries.

In order to minimize the chance of excessive recreational harvest, as well as circumvention of commercial eel regulations, the ASMFC member states/jurisdictions shall establish uniform possession limits for recreational fisheries. States and jurisdictions are required to adopt a nine (9) inch minimum size limit for all recreational fisheries.

**Recreational Bag Limit** - Given the interest to have all fishery sectors contribute to conservation measures under Addendum III all states and jurisdictions are required to implement a daily recreational bag limit of 25 fish per day per angler.

**Party/charter (for hire) exemption** - Crew and captain involved in party/charter (for-hire) employment on party/charter (for-hire) activities are exempt from recreational bag limit reduction. Crew members involved in for-hire employment are allowed to maintain the current 50 fish per day bag limit for bait purposes during fishing, as specified under the American Eel ISFMP.

The Commission’s Plan required all member States to implement the plan’s eel regulations by January 1, 2014. As of August 6, 2015, Delaware still had not implemented the required actions. During both the Commission's August 5, 2015, American Eel Management

Board meeting and its August 6, 2015, Policy and Business Board meetings, Delaware agreed with the Boards' determinations that they were not in compliance with the Plan.

### **Agency Action In Response to Commission Non-Compliance Referral**

The Commission forwarded its findings of their August 6th vote in a formal non-compliance referral letter that the Secretary received on August 19, 2015. In response to receipt of this letter, NMFS began the Atlantic Coastal Act's 30-day determination clock. On August 21, 2015, NMFS sent letters to the State of Delaware, the Mid-Atlantic Fishery Management Council, the U.S. Fish & Wildlife Service (USFWS), and to the Commission, advising them of the Atlantic Coastal Act's non-compliance process, inviting them to provide commentary on the issue, and in the case of Delaware, inviting the State to meet with NMFS to present its position in person or provide written comments on the Commission findings. NMFS also advised the public of the referral, and invited comments in a **Federal Register** notice dated August 27, 2015 (80 FR 166).

On September 2, 2015, Delaware representatives met with NMFS staff via conference call. During this meeting, Delaware agreed that it was out of compliance and that it did not contest the conservation necessity of the Commission's American eel measures. Delaware described its legal and regulatory framework for eel, its eel fishery, and confirmed its intent to finalize legislation to comply with measures identified in Addendum III in January 2016 irrespective of any Federal action. Delaware followed up that meeting with a letter on September 11, 2015, that provided additional information on Delaware's past efforts and current plans to comply with the Plan, previous and current eel conservation measures and eel fisheries. NMFS received one public comment in response to the referral of non-compliance. That

comment supported a full moratorium, albeit without articulating any background or factual support. The USFWS also provided a letter with comments concurring with the Commission finding that the State of Delaware is currently out of compliance with the ISFMP for American Eel. In addition, the USFWS has been undertaking an extensive status review for the American eel to determine if adding the species to the Federal list of endangered and threatened wildlife list is warranted. A petition to list American eel was submitted by the Council for Endangered Species Act Reliability. A 12-month finding as to whether the listing is warranted is expected by September 30, 2015.

### **Agency's Findings**

NMFS' findings in this matter support a positive 30-Day Determination of non-compliance. The best available science suggests that American eel are depleted and that management measures are necessary to conserve the species. Specifically, the 2012 Benchmark American Eel Stock Assessment indicated that the American eel stock has declined in recent decades and the prevalence of significant downward trends in multiple surveys across the coast is cause for concern. The measures that Delaware failed to adopt were recommended by the Commission in Addendum III to respond to the stock assessment's findings. Delaware voted to approve those measures in 2013 during the Addendum III process and the state agrees even now that the measures are necessary for conservation. NMFS also agrees.

NMFS recommends that the required moratorium begin on March 18, 2016. This moratorium would prohibit, in Delaware waters, the possession of American eel (all life stages). We chose the March implementation date after consulting with the relevant staff from Delaware, and reviewing the facts of this situation, including the Commission deliberations from this past August. Based upon our analysis, we found that a March implementation date is appropriate for

two principle reasons. First, a March 18<sup>th</sup> closure date will give Delaware the time necessary for its legislature to bring these regulations back into compliance. Second, although the involved measures are necessary for conservation, the immediacy of that need is less critical given that Delaware's fall eel fishery appears to not target eels that are the subject of Addendum III's protection.

Delaware indicated to us that they expect to have appropriate regulations protecting American eel in place by early next year. If the State of Delaware does enact such measures, and the Commission determines that the measures are compliant with the Plan, under the Act, the Commission would immediately notify the Secretary that the state of Delaware is in compliance with the Plan. If NMFS concurs, the moratorium in the state waters of Delaware will be rescinded. If Delaware is unable to put in place appropriate regulations prior to March 18, 2016, then a Federal moratorium on eel fishing in Delaware waters would be immediately implemented and continue until the Secretary concurs with a determination from the Commission that the state of Delaware has come into compliance with the Plan.

### **Moratorium Prohibitions**

The positive 30-day finding triggers the moratorium prohibitions set forth in the Atlantic Coastal Act, 16 U.S.C. 5106(e). Accordingly, on March 18, 2016, NMFS will implement an American eel moratorium for in Delaware state waters. At that time, it will be unlawful to do the following:

- 1) Engage in fishing for American eel within the waters of the Delaware (NOTE: under the Atlantic Coastal Act, the definition of "fishing" includes landing and/or possessing);
- 2) Land, attempt to land, or possess American eel that are caught, taken, or harvested in violation of the moratorium;

3) Fail to return to the water immediately, with a minimum of injury, any American eel in Delaware waters that are taken incidental to fishing for species other than those to which the moratorium applies;

4) Refuse to permit any officer authorized to enforce the provisions of this moratorium to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter;

5) Forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this moratorium;

6) Resist a lawful arrest for any act prohibited by this moratorium;

7) Ship, transport, offer for sale, sell, purchase, import, or have custody, control, or possession of, any fish taken or retained in violation of this moratorium; or

8) Interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this moratorium.

### **Classification**

This declaration of a moratorium is consistent with the Atlantic Coastal Act at 16 U.S.C. 5106 insofar as Delaware has been found to have failed to carry out its responsibilities under the Commission's American Eel Plan and the measures that Delaware has failed to implement and enforce are necessary for the conservation of the American eel fishery. Further, the moratorium prohibits fishing, possessing and/or landing American eel within Delaware state waters and is being implemented within six months of the agency findings.

The declaration of a moratorium is consistent with the Administrative Procedures Act at 5 U.S.C. 555 insofar as Delaware was given prompt notice of the Commission's non-compliance referral and was given an opportunity to meet with the agency and provide comments on this

matter. Further, the agency has immediately notified Delaware of the agency's determination in this matter. Additionally, NMFS provided notice to the public of this compliance action in a notice in the **Federal Register** dated (80 FR 166, August 27, 2015). NMFS received one comment in response to that notice suggesting that Delaware be found out of compliance and that a moratorium be implemented. The comment did not provide any further detail. NMFS' present action is consistent with the commenter's suggested outcome.

NMFS finds that public comment is impracticable and contrary to the public interest, not only because the rigid statutory time lines makes such impracticable and would impermissibly delay mandatory agency action, but also because the issue has been considerably vetted in public forums, such as before the Delaware General Assembly and the Commission in the months prior to the referral. Nevertheless, NMFS did notify the public of this action in its **Federal Register** Notice (80 FR 166; August 27, 2015). NMFS received one comment, which supported a moratorium and is described above.

The declaration of moratorium does not trigger the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* because the action was not the result of notice and comment rulemaking under Section 553 of the Administrative Procedures Act.

The declaration of a moratorium does not fall under review under Executive Order 12866 insofar as the moratorium is not a regulatory action of the agency but is an action mandated by Congress upon the findings of certain conditions precedent set forth in the Atlantic Coastal Act, which also prescribes the nature and extent of the moratorium. Nevertheless, the agency has determined that this action is not significant for the purpose of E.O. 12866. The fishery is small and a moratorium is not expected to materially adversely affect the economy or have an impact

of over \$100 million. The matter creates no serious inconsistency with actions by other agencies and is not expected to have material budgetary impacts.

The moratorium is not the result of a policy formulated or implemented by the agency, but instead is the result of the application of found facts to the Congressional standards set forth in the Atlantic Coastal Act and as such, the declaration does not implicate federalism in the manner contemplated by Executive Order 13132. The agency, however, has nevertheless consulted, to the extent practicable, with appropriate state and local administrative and law enforcement officials to address the principles, criteria, and requirements of E.O. 13132.

**Authority:** 16 U.S.C. 5101 *et seq.*

Dated: September 18, 2015.

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Eileen Sobeck,  
Assistant Administrator for Fisheries,  
National Marine Fisheries Service.

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