



DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

### 50 CFR Part 648

#### RIN 0648-BL45

### **Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Amendment 23 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan**

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

**ACTION:** Availability of proposed fishery management plan amendment; request for comments.

**SUMMARY:** The Mid-Atlantic Fishery Management Council has submitted the Black Sea Bass Commercial State Allocation Amendment (Amendment 23) to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan to NMFS. Amendment 23 proposes to establish commercial state-by-state allocations for black sea bass in the Federal fishery management plan and regulations, change the trigger for the in-season closure accountability measures and change the state-coverage payback. Amendment 23 is intended to address the allocation-related impacts of the significant changes in the distribution of black sea bass that have occurred since the original allocations were implemented.

**DATES:** Comments must be received by [*insert date 60 days after date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2023-0041 by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-

2023-0041 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

*Instructions:* Comments sent by any other method, to any other address or individual or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.*, name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Copies of Amendment 23, including the Environmental Assessment, the Regulatory Impact Review, and the Regulatory Flexibility Analysis (EA/RIR/RFA) prepared in support of this action are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The supporting documents are also accessible via the Internet at: <https://www.mafmc.org/actions/bsb-commercial-allocation>.

**FOR FURTHER INFORMATION CONTACT:** Emily Keiley, Fishery Policy Analyst, (978) 281-9116, or [Emily.Keiley@noaa.gov](mailto:Emily.Keiley@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each Regional Fishery Management Council transmit any amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an amendment and associated regulations deemed necessary by the Council to implement the amendment, immediately publish notification in the **Federal Register** that the

amendment is available for public review and comment. The Mid-Atlantic Council transmitted its final version of Amendment 23 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) to NMFS for review on September 14, 2022. On April 13, 2023, the Council submitted Amendment 23 proposed rule regulations they deemed to be necessary and appropriate as specified in section 303(c) of the Magnuson-Stevens Act.

Amendment 23 considers changes to the management of the commercial black sea bass fishery. Specifically, this amendment proposes to establish the commercial black sea bass state-by-state allocations in the Federal FMP and regulations, while also making changes to those state allocations (previously managed only under the Atlantic States Marine Fisheries Commission's FMP), proposes a change to the Federal in-season closure regulations for the commercial black sea bass fishery, and proposes a change to the provisions that apply when a quota overage occurs to incorporate the potential for a state-level overage. The intended purpose of the proposed state allocation changes is to provide fair and equitable access to the commercial black sea bass fishery among states in the management unit, taking into consideration the historical dependence of the states on the fishery, as well as changes in abundance and stock distribution over time. The purpose of the change to the in-season closure trigger is to continue to prevent commercial annual catch limit (ACL) overages while minimizing potential negative socioeconomic impacts of Federal in-season closures on states that have not fully harvested their allocations.

Under section 304(a)(3) of the Magnuson-Stevens Act, the Secretary of Commerce may disapprove, or partially approve an amendment submitted by the Council if it is determined to be inconsistent with a provision of the Magnuson-Stevens Act or other applicable law. The sections below describe the factors we are considering in making the decision to approve, disapprove, or partially approve Amendment 23. The

final decision on Amendment 23 will be announced to the Mid-Atlantic Council within 30 days of the end of the comment period for this notification of availability.

## **Proposed Measures**

### *Council Management of State Allocations*

This amendment considers whether the state allocations should remain only in the Commission's Interstate FMP, or if they should be included in both the Council and Commission's FMPs. The stated purposes are to provide fair and equitable access to the commercial black sea bass fishery among states in the management unit, taking into consideration the historical dependence of the states on the fishery, as well as changes in abundance and stock distribution over time; to allow the Council and Commission to determine which management measures are most appropriate for joint management in both FMPs; and to help prevent commercial ACL overages while minimizing potential negative socioeconomic impacts of Federal in-season closures on states that have not fully harvested their allocations. Under the Council's preferred alternative, the state allocations would be added to the Federal FMP. If approved, this change would mean that future changes to the allocations must be considered through a joint action of the Council and Commission. This change would also shift an administrative burden and cost of monitoring state quotas and processing state quota transfers to the Regional Office, similar to what is done for Atlantic bluefish and summer flounder. We are considering disapproving the addition of the state allocations to the Federal FMP, and specifically invite public comment on this. A summary of our rationale is provided below.

Adding the state allocations to the Federal FMP would unnecessarily increase the administrative burden on, and cost to, state agencies and NMFS, and create additional inefficiencies, with no clear direct benefit to either the government, the resource, or the fisheries. This is contrary to the direction of National Standard 5 to consider efficiency in the utilization of fishery resources and National Standard 7's direction to minimize costs

and avoid unnecessary duplication. National Standard 7 guidelines, in particular, state that “[m]anagement measures should not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments.” The Commission has been successfully managing the black sea bass state commercial quotas since their inception in 2003, while NMFS monitors commercial landings coastwide and tracks total landings against the coastwide quotas. Under the current Commission process, state-to-state quota transfers are processed efficiently without the added administrative burden of the Federal process, which, for summer flounder and bluefish, requires significantly more time and resources and reduces flexibilities for states, including the need to publish state quota transfers in the **Federal Register** before they can be effective. In addition to the increased administrative burden, shifting the allocations into the Federal FMP encumbers the management process such that both the Council and Board must agree on any future changes to the allocations.

Currently, Commission management of this stock includes members from all states and its process will continue to allow equity in representation when making future changes to state allocations. Management by the Mid-Atlantic Council has representation from the states from New York to North Carolina, but does not include membership from the northern states, such as Connecticut, Rhode Island, and Massachusetts, that also have a strong interest in the black sea bass fishery. Given climate change and the northward expansion of the black sea bass stock, this inequity in representation on the Council creates challenges when making decisions regarding future potential allocation changes, by providing the states with seats on the Council a disproportionate role in the decision-making process. The absence of northern states in the Council’s membership has important implications for addressing National Standard requirements. For example, while the threshold decision of whether to include the state commercial quotas in the Federal FMP is not an allocation of fishing privileges, it is not clear how this action will

provide for National Standard 4's requirement of fair and equitable allocations and National Standard 8's mandate to provide for the sustained participation of all fishing communities along with minimizing adverse economic impacts on such communities to the extent practicable. Given that black sea bass has already become an important commercial and recreational species for fishermen in northern states, it is important that the management body with the authority to change state allocations is inclusive of the states with an interest in the fishery. Continued northward expansion of the stock is expected due to climate change, which is expected to exacerbate the already challenging allocation deliberations of the Council and Commission. Adding the state allocations to the Federal FMP and thus giving the Mid-Atlantic Council jurisdiction over these state allocations without northern states as Council members, while the Commission does include these states, creates management challenges—including potentially inadequate consideration of northern states' fisheries, or even different allocation decisions from each body. This could make the management of this stock less adaptable to future changes in distribution of both the resource and the fisheries that rely on it, implicating concerns regarding variations and contingencies as articulated by National Standard 6.

#### *Commercial State Allocation Scheme*

This joint action considered changes to the distribution of commercial black sea bass quota among the states. Because the state commercial allocations are not currently a part of the Federal FMP, the Commission considered and implemented a new allocation formula in its FMP. The Council is recommending we adopt the same allocation scheme in the Federal FMP.

This new allocation does not specify fixed-allocation percentages, but defines a process for calculating allocations that is partially based on biomass distribution. The allocations would be modified through the specifications process each time new biomass distribution information is available. Specifically, the state allocation percentages will be

calculated using the following steps:

- 1) Connecticut's baseline allocation was increased from 1 to 3 percent, and New York's baseline allocation was increased from 7 to 8 percent;
- 2) Seventy-five percent of the coastwide quota is then allocated according to the new baseline allocations (*i.e.*, the original allocations implemented by Amendment 13 to the Interstate FMP in 2003 would be modified to account for the initial increases to Connecticut and New York);
- 3) Twenty-five percent of the quota is allocated to three regions based on the most recent regional biomass distribution information. The three regions are: Maine-New York, New Jersey, and Delaware-North Carolina; and,
- 4) The regional allocations are distributed among states within a region in proportion to their baseline allocations, except Maine and New Hampshire would each receive 1 percent of the northern region quota.

While we are considering disapproving the inclusion of these revised allocations in the Federal FMP due to the unnecessary increase in administrative burden and inefficiencies, and the lack of northern states as members of the Council as described above, we are supportive of the revised approach that was developed by the Council and Commission as it includes consideration of the distribution of the black sea bass stock, and the ability to revise allocations as the stock shifts. As noted, the Commission has already implemented this process for the development of the 2023 commercial quotas and this process will continue to serve as the basis for state-by-state allocations regardless of NMFS's final decision with respect to promulgating the proposed state allocations in Federal regulations.

#### *Federal Commercial In-season Closure Trigger*

Currently, the Federal FMP requires a commercial coastwide in-season closure for all federally permitted vessels and dealers, regardless of state, once the coastwide

quota is projected to be landed. This amendment considers changing this trigger, so that the closure would occur once landings are projected to exceed the coastwide quota plus an additional buffer of up to 5 percent. The Council and Board would agree to the appropriate buffer for the upcoming year through the specifications process. The Council's Monitoring Committee and the Commission's Technical Committee would provide advice on the appropriate buffer based on considerations such as stock status, the quota level, and recent fishery trends. We are proposing to approve this change to the in-season closure trigger.

#### *Overages and State Payback Requirements*

Under the Commission FMP, overages of state-specific quotas are only required to be paid back by a state when the coastwide quota has been exceeded. If the state allocations are included in the Federal FMP the Council and Board's preferred alternative is to maintain this payback provision. In years when the annual landings do not exceed the coastwide quota, no state-level or coastwide paybacks would be required. If the annual coastwide quota is exceeded, states with quota overages will be required to pay back those overages in the following year. All black sea bass landed for sale in a state shall be applied against that state's annual commercial quota, regardless of where the black sea bass were harvested. Any landings in excess of the commercial quota in any state, inclusive of any state-to-state transfers, will be deducted from that state's annual quota for the following year in the final rule that establishes the annual state-by-state quotas. The overage deduction will be based on landings for the current year through October 31, and on landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the annual quota for the current year. Should NMFS disapprove establishing the state-by-state allocation in Federal regulations, as explained above, this provision would also be disapproved as moot in the Federal FMP, though it would continue to apply through the Commission

process.

### **Public Comment Instructions**

The Magnuson-Stevens Fishery Conservation and Management Act authorizes the Secretary of Commerce to approve, partially approve, or disapprove measures recommended by the Council in an amendment based on whether the measures are consistent with the fishery management plan, plan amendment, the Magnuson-Stevens Act and its National Standards, and other applicable law. As such, we are seeking comment on whether measures in Amendment 23 are consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, the Magnuson-Stevens Act and its National Standards, and other applicable law. Public comments on this amendment and its incorporated documents may be submitted through the end of the comment period stated in this notification of availability.

A proposed rule to implement the amendment, including draft regulatory text, will also be published in the **Federal Register** for public comment. Public comments on the proposed rule received before the end of the comment period provided in this notification of availability will be considered in the approval/disapproval decision on the amendment. All comments received by [*insert date 60 days after date of publication in the Federal Register*], whether specifically directed to Amendment 23 or the proposed rule for this amendment, will be considered in the approval/disapproval decision on the Commercial State Allocation Amendment. Comments received after that date will not be considered in the decision to approve or disapprove the amendment. To be considered, comments must be received by close of business on the last day of the comment period.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: April 28, 2023.

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Jennifer M. Wallace,  
Acting Director, Office of Sustainable Fisheries,  
National Marine Fisheries Service.

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